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No. 92-___

Supreme Court, U.S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JEFFREY R. MACDONALD,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

HARVEY A. SILVERGLATE
(Counsel of Record)
ANDREW H. GOOD
PHILIP G. CORMIER
SILVERGLATE & GOOD
89 Broad Street, 14th Floor
Boston, Massachusetts 02110
(617) 542-6663

*Attorneys for Petitioner*

October 7, 1992

## QUESTIONS PRESENTED

1. Does the requirement that a federal court hold an evidentiary hearing on disputed issues of material fact when deciding the merits of a 28 U.S.C. § 2255 petition [*Machibroda v. United States*, 368 U.S. 487 (1962)], apply as well when deciding whether a federal prisoner has made a showing that there has been a "miscarriage of justice" [*Sanders v. United States*, 373 U.S. 1 (1963)] entitling him to overcome the jurisdictional bar to review on his second § 2255 petition?

2. Does the "cause and prejudice" test which applies to "abuse of the writ" challenges to *habeas corpus* jurisdiction in state § 2254 cases apply equally to this federal prisoner's second § 2255 petition, despite the absence of considerations of comity and federalism?

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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Jeffrey R. MacDonald petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the denial of his motion pursuant to Title 28 U.S.C. § 2255 filed in the United States District Court for the Eastern District of North Carolina.

## OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A: pp. 1a-13a) is reported at 966 F.2d 854 (4th Cir. 1992). The opinion

of the District Court (Appendix B: pp. 14a-49a) is reported at 778 F.Supp. 1342 (E.D.N.C. 1991).

## JURISDICTION

The judgment of the Court of Appeals was entered June 2, 1992. A timely petition for rehearing was filed June 15, 1992, and was denied July 9, 1992 (Appendix C: p. 50a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "no person . . . shall be . . . deprived of life, liberty, or property, without due process of law."

Section 2255 of Title 28, U.S.C., provides, *inter alia*:

> A prisoner in custody under sentence of a court established by an Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * *
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.
>
> * * *
>
> The sentencing court shall not be required to entertain a second or subsequent motion for similar relief on behalf of the same prisoner.

Rule 9 (b) of the Rules Governing § 2255 Cases in the United States District Courts provides:

> A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits, or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

## STATEMENT

This case raises two important questions which arise frequently in the administration of collateral attack jurisdiction in federal criminal cases under 28 U.S.C. § 2255.

MacDonald's second § 2255 petition was supported by evidence which, if credited in the face of contrary evidence presented by the government, would establish a "miscarriage of justice". *Sanders v. United States*, 373 U.S. 1 (1963). By affirming the denial of the petition without an evidentiary hearing, the Court of Appeals refused to apply § 2255's requirement of such a hearing [*Machibroda v. United States*, 368 U.S. 487 (1962)] when the district court decides whether a petitioner has met the *McCleskey v. Zant* "miscarriage of justice" standard.[1] This petition seeks review of the Court of Appeals ruling on the applicability of *Machibroda*'s hearing requirement where the factual issues joined are dispositive of a § 2255 petition's jurisdictional, "factual innocence" claim.

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[1] In *McCleskey v. Zant*, __ U.S. __, 111 S.Ct. 1454, 1471 (1991), this Court interpreted the "miscarriage of justice" standard of *Sanders* to require a "colorable showing of factual innocence." Petitioner does not challenge the application of the *McCleskey* "colorable showing of factual innocence" standard to this § 2255 case, and this petition uses the two standards interchangeably.

The Court of Appeals further held that petitioner's failure to present in his prior § 2255 petition government lab notes which he relies upon in this second petition, was an "abuse of the writ". That Court did this by applying the "cause and prejudice" standard which this Court recently held applicable to § 2254 abuse-of-the-writ cases. *McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454 (1991). This petition seeks review of whether the "cause and prejudice" standard for § 2254 cases applies equally to federal criminal cases under § 2255.

**A. Prior Proceedings.**

On August 29, 1979, MacDonald was convicted on three counts of murder and sentenced to three consecutive life terms.[2] On direct appeal, the Fourth Circuit reversed his convictions on speedy trial grounds. *United States v. MacDonald*, 632 F.2d 258 (4th Cir. 1980), *reh'g denied*, 625 F.2d 1115 (4th Cir. 1980). This Court reversed, *United States v. MacDonald*, 456 U.S. 1 (1982), and, on remand, the Fourth Circuit affirmed the convictions. *United States v. MacDonald*, 688 F.2d 224 (1982), *cert. denied*, 459 U.S. 1103 (1983).

In 1984, MacDonald filed a § 2255 Motion to Vacate the Judgment. All claims were denied. *United States v. MacDonald*, 640 F.Supp. 286 (E.D.N.C. 1985), *aff'd*, 779 F.2d 962 (4th Cir. 1985), *cert. denied*, 479 U.S. 813 (1986).

In October 1991, petitioner filed a second § 2255 motion, which was denied. *United States v. MacDonald*, 778 F.Supp.

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[2] Prior to trial, MacDonald brought an interlocutory appeal alleging violations of his right to a speedy trial and right against double jeopardy. *See United States v. MacDonald*, 531 F.2d 196 (4th Cir. 1976) (pre-trial dismissal on speedy trial grounds), *rev'd*, 435 U.S. 850 (1978); *United States v. MacDonald*, 585 F.2d 1211 (4th Cir. 1978) (guarantee against double jeopardy does not bar federal prosecution after dismissal of Army charges), *cert. denied*, 440 U.S. 961 (1979).

1432 (E.D.N.C. 1991) (pp. 14a-49a, *below*). The Court of Appeals affirmed on June 2, 1992, 966 F.2d 854 (pp. 1a-13a, *below*), and denied a petition for rehearing on July 9, 1992 (p. 50a, *below*). Petitioner seeks review of that judgment.

**B. Introduction.**

The case that convicted petitioner demonstrated to the jury that his account of how the murders occurred — that his home was invaded by four intruders who murdered his family and injured him — was contradicted by forensic evidence. In particular, the government relied heavily upon MacDonald's inability to show that the intruders, whose appearance and attire he described, had left at the crime scene any fiber or trace evidence of their presence. This theory was bolstered by an instruction that if the defendant's account were a lie, the jury could infer guilt of the crime. Every appellate decision in the case that has dealt with the evidence has accepted this view.

The instant § 2255 petition arose out of the FOIA discovery of government forensic examiner's lab notes. These notes document the presence at the scene of certain fibers that petitioner asserts would have directly corroborated his account of the murders and would have led to the admission into evidence of out-of-court confessions by one member (Helena Stoeckley) of the group that petitioner has consistently described as the murderers.[3]

The lab notes describe the following fibers as having been found: (1) 22-inch blond synthetic fibers "made to look like hairs", and (2) black wool fibers found on a murder weapon —

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[3] The petition alleges that the government knowingly or recklessly presented a false case to the jury, because it knew or was chargeable with knowing about the exculpatory lab notes. In the alternative, MacDonald asserted that these notes were suppressed, despite his specific requests, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.

a club — and in the mouth and on the bicep of one of the victims. Petitioner contended that, if the jury knew that long blond wig fibers were found at the scene, it would have viewed the fibers as corroboration of defense testimony about a blond-wigged Helena Stoeckley at the scene, and nearby shortly thereafter. Further, if the jury knew about black wool fibers found on a victim's body and in her mouth and on a murder weapon and which could not be matched to any clothing in the MacDonald household, it would have inferred that these black fibers — because of their locations — had been left by a murderous intruder. The exculpatory value of the black wool fibers would have been corroborated and heightened by evidence that Stoeckley wore black clothes on the night of the murders, linking her circumstantially to the fibers. The fibers evidence also would have corroborated (and thereby rendered admissible) Stoeckley's excluded out-of-court confessions.

Opinions of the Court of Appeals at prior stages observed that, if the jurors would have had before them evidence of Stoeckley's confessions, and if petitioner's account of intruders were corroborated rather than contradicted by the forensic evidence, grievous damage would have been done to the prosecution case. *See* 632 F.2d at 264 and 688 F.2d at 233-234.

Yet the Court of Appeals affirmed the District Court's refusal to grant an evidentiary hearing on this § 2255 petition. This affirmance was based on two grounds. First, it held that MacDonald's second § 2255 petition would be required to meet the § 2254 "cause and prejudice" test for avoiding the "abuse of the writ" jurisdictional bar of *McCleskey v. Zant*, *supra*, and that the test was not met. Second, the Court of Appeals rejected petitioner's jurisdictional claim of "factual innocence", even though the record contained controverted evidence as to the origins of the fibers described in the lab notes. In their opinions denying the petition, neither of the courts below, in the absence

of an evidentiary hearing, took MacDonald's evidence as true, as required by § 2255 and *Machibroda*. Neither opinion states that MacDonald's evidence is insufficient as a matter of law as a "colorable showing of factual innocence". If MacDonald's evidence were taken as true (as § 2255 requires), the 22-inch blond synthetic fibers were wig hairs from a woman's wig, and if the black wool were unmatched to any item in the MacDonald household, then a strong inference could be drawn that MacDonald's description of murderous intruders -- who included a woman who fit Helena Stoeckley's testimony in that she wore a blond wig and black clothing on the night of the murders — was powerfully confirmed by the physical evidence. However, both the District Court and Court of Appeals credited the government's evidence -- that the 22-inch long blond fibers likely were from a mannequin or doll, rather than from a woman's wig, and that the black wool probably came from a piece of unidentified clothing that the MacDonald children may have had at some point in time. In so ruling without convening an evidentiary hearing, the courts below accorded greater weight to the government's evidence than to petitioner's evidence.[4]

The heart of the Court of Appeals' holding states:

> The evidence raised here, when considered with all the trial evidence, simply does not rise to a "colorable showing of factual innocence" necessary to show a fundamental miscarriage of justice. It neither supports MacDonald's account of the murders nor discredits the government's theory. The most that can be said about the evidence is that it raises speculation concerning its origins. Furthermore, the origins of the hair and fiber evidence have several likely explanations other than

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[4] The record on these factual issues is more fully described *infra* at 13-18.

> intruders. The evidence simply does not escalate the unease one feels with this case into a reasonable doubt.

(p. 12a, *below*)

One question here is whether the Court of Appeals could, despite its sense of "unease one feels with this case", refuse to convene, at the jurisdictional stage, an evidentiary hearing mandated for § 2255 petitions by *Machibroda*, and instead make summary findings against petitioner concerning dispositive and contested facts.[5] If *Machibroda* does not apply to jurisdictional "factual innocence" inquiries, then the "miscarriage of justice" exception to the abuse-of-the-writ bar to collateral review of federal convictions is a cruel chimera.

*McCleskey*'s "factual innocence" doctrine surely was not meant to summarily slam the door and throw away the key when factually innocent petitioners with claims of constitutional violations proffer new evidence which, if credited, establishes factual innocence, merely because the petitioner's evidence is controverted by prosecution evidence. If *McCleskey* worked a change in the availability of evidentiary hearings to evaluate jurisdictional claims of federal convicts claiming to be "factually innocent", this Court has the duty to clarify the change by exercising its power over the administration of federal criminal justice.

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[5] The District Court actually went even further than the Court of Appeals in violating *Machibroda*. Since it concluded that the very same factual determinations that governed the outcome of the jurisdictional question likewise governed the result on the merits, (p. 26a, *below*), it ruled against petitioner on both the jurisdictional question and the merits on the basis of its summary fact findings made on a contested record without an evidentiary hearing. The Court of Appeals, once it ruled against petitioner on the *McCleskey* issue, did not proceed to review petitioner's claims that the District Court had erred on the merits.

This case calls on this Court to rule, in the interests of maintaining uniformity, rationality and elemental justice in the law of collateral attack [*Keeney v. Tamayo-Reyes*, ___ U.S. ___, 112 S.Ct. 1715 (1992)], that federal district courts must conduct evidentiary hearings to decide factual questions which are determinative of whether the court has § 2255 jurisdiction to review the merits, where the petitioner's evidence, if taken as true, makes a "colorable showing of factual innocence".

C. Material Facts.

Most material facts are reported at 966 F.2d 854 (4th Cir. 1992) (Appendix A) and 778 F.Supp. 1342 (E.D.N.C. 1991) (Appendix B). A summary follows.[6]

Petitioner was convicted in 1979 of murdering his wife and two daughters at Fort Bragg, North Carolina. Upon gaining consciousness and finding military police at his side, MacDonald gave an account to which he has always adhered. He reported that four intruders entered his house while he slept on a living room sofa. (A 0464) He described a woman with long blond hair and a floppy hat and boots, along with three men. (A 0471-72) He said he was attacked, wounded and lost consciousness. (A 0462-75) When he awoke, he found his family beaten and stabbed to death. (A 0477-89) He made a call to the military police, then passed out until revived by them. (A 0491-97)

A policeman testified that on his way to the scene he saw a woman standing on a street corner near the MacDonald home, in the rain, with long hair and a "wide-brimmed . . . somewhat 'floppy'" hat (A 0170). The defense called as a trial witness Helena Stoeckley, who, shortly after the murders, had confessed to numerous persons that she was one of the intruders that

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[6] Citations to the Joint Appendix filed below are "(A [page number])." Trial Transcript citations are "(T [page number])."

MacDonald described. Stoeckley testified that she had owned a shoulder-length blond wig, floppy hat, and boots at the time of the murders (A 0378, 0380-81, 0385, 0387, 4412); that she always wore dark purple or black clothing (A 0390); and that she had destroyed the wig shortly after the murders for fear that she would be implicated. (A 0385-86, 4412, 4415) However, she added that, while she could remember where she was in the hours shortly before and after the murders, she could not remember where she was during the murders. (A 0375-77)[7] Stoeckley refused to acknowledge in court that she had confessed to numerous persons. (T 5628-30) The defense moved for the admission of seven out-of-court confessions pursuant to Fed.R.Evid. 804(b)(3). (T 5954-55) The jury, however, never heard this evidence. The court excluded it

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[7] In connection with the instant § 2255 petition, the District Court described the evidence concerning Stoeckley as follows:

> Investigators initially accepted MacDonald's account of the murders and immediately began searching for four people fitting his descriptions of the alleged intruders. Considerable suspicion was focused upon Helena Stoeckley, a nineteen year-old Fayetteville resident who resembled MacDonald's description of the female assailant. Stoeckley had been seen returning to her apartment at 4:30 on the morning following the killings in the company of men also generally fitting the descriptions given by MacDonald. Within days of the crime, Stoeckley, an acknowledged heavy drug user, began telling people that she was involved in the murders or that she had been in the MacDonald apartment with friends who had committed the murders. She admitted to owning and frequently wearing a blond wig and a pair of white boots and said that she destroyed them within a few days after the crime because they might connect her with the MacDonald murders. At other times, however, Stoeckley denied any knowledge of the murders, saying that she had taken so many drugs on the night in question that she could not remember anything. [pp. 17a-18a, *below*]

The District Court did not mention that Stoeckley's confessions were made to friends, neighbors, and confidants, whereas her protestations of denial or memory loss were made to federal law enforcement personnel.

because there was nothing to corroborate Stoeckley's confessions, and her history of drug use made her unreliable. (A 0432-36) (pp. 31a-32a, *below*).

The forensic evidence underlying the instant § 2255 petition would have corroborated petitioner's account of the crime and also have caused the admission of Stoeckley's seven confessions, since it would have shown the reliability of those confessions.

At trial, the core of the government's case was the testimony of forensic experts who, the government argued successfully to the jury, demonstrated that the defendant's account could not have been true, since it did not comport with the forensic evidence. The government emphasized in its summation that there was no physical evidence to support the defendant's testimony that the apartment had been invaded and the murders committed by intruders, one of whom was a female with long blond hair.[8] The judge instructed that if the jury found the

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[8] In closing arguments, prosecutor James Blackburn pointed out this lack of forensic support when he said to the jury:

> I suggest that when you compare and contrast [MacDonald's] story versus the Government's story — testing the credibility of the government's case as well, I think you should — you have got to come down on one side or the other because I suggest to you that the evidence in this case, if it shows nothing else, it does show that what he said and what the physical evidence says are not reconcilable and that they are diametrically opposed.

(A 0600) (emphasis added)

defendant was lying, it could conclude he was the murderer.[9] The jury convicted on all counts.

The instant § 2255 petition alleged that the trial prosecutor suppressed certain laboratory bench notes of its forensic experts, which would have provided the missing forensic support for the defendant's account. One set of notes documented the presence of 22-inch blond "synthetic striated fibers made to look like hairs" (A 1554, 1612, 3625) found in a hairbrush on a table next to a telephone that Stoeckley, in a post-trial interview, indicated she answered. (A 065-66, 1637) Another set of notes documented black wool fibers in the mouth of Mrs. MacDonald's body, on her bicep, and on the club murder weapon. (A 1561-68, 1714-15) At the time of the murders, the defendant was wearing blue pajamas, not black wool, and the black wool was never matched to any item in the home. (A 1561-68, 1714-15) (p. 29a, *below*). The presence of MacDonald's blue pajama fibers on the club had been introduced at trial as evidence that he wielded it as a weapon to murder his family. (A 0239-40, 0256-58, 0273-74, 0554-56, 0618-19, 4296-97) *See* fn. 14, *infra*. However, after FOIA-released lab notes disclosed that an FBI examiner had found unmatched black wool on the club and body, the government submitted the affidavit of an FBI analyst deeming these fibers "forensically insignificant". (A 3938, 3945-47, 4356, 4426)

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[9] "When a defendant voluntarily and intentionally offers an explanation or makes some statement tending to show his innocence, and this explanation or statement is later found by the jury to be false, the jury may consider whether this circumstantial evidence points to a consciousness of guilt.

"Ordinarily, it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his innocence." (A 0800)

Section 2255 jurisdiction depended on whether petitioner's evidence concerning the blond synthetic fibers and black wool was sufficient to establish "a colorable showing of factual innocence". In response to MacDonald's evidence, the government submitted controverting evidence that its lab notes and the fibers were "forensically insignificant". Hence, the answer to the jurisdictional question of "factual innocence" depended on contested factual issues concerning the origins of the blond synthetic and black wool fibers found at telling locations at the scene. The locations and compositions of these fibers were established by the government's lab notes. A question to be resolved by weighing conflicting evidence was whether the substance — saran — which the blond synthetic fibers were made of was used prior to the February 1970 murders to manufacture cosmetic wigs, or used solely to manufacture other products, such as patio screens and mannequin or doll hair. Even while the Court of Appeals decision points out that "[f]orensic experts have never been able to compare the blond hair strands to Stoeckley's wig because she burned the wig a few days after the murders," (p. 5a, n.3, *below*) that Court credits the government's evidence that the blond synthetic hairs are inconsequential because "[a]ccording to one of its forensic experts, the three blond synthetic hairs found in the brush were made of saran, an inexpensive substance generally used only in doll hair and mannequin wigs." (p. 5a-6a, *below*)

**D. The Fact Dispute Over the Source and Origin of 22-Inch Blond Synthetic Hairs and Black Wool Fibers.**

In support of his § 2255 motion, petitioner submitted the government's forensic lab notes, which disclosed 22-inch blond synthetic fibers "made to look like hairs", and black wool fibers; they had not been disclosed at trial. (A 1283, 1288,

1295-96, 1302, 1309, 1317-18, 1719-23, 1880-81, 1886-87) There was no dispute as to the composition nor location of these fibers. The sole issue was their origin and, ultimately, whether they were evidence of intruders — a dispositive conclusion that would flow directly from the finding as to origin.

**1. Synthetic Blond Wig Hairs In the MacDonald Home.**

On March 9, 1971, a government forensic examiner, Janice Glisson, catalogued the debris found on the clear-handled hairbrush from the living room/dining area.[10] She tentatively identified blond synthetic fibers "up to 22 [inches]" which she characterized as "synthetic striated fibers made to look like hairs." (A 1554, 1612, 3625) (emphasis added) She later confirmed the identification, and her findings of 22-inch blond synthetic hairs were re-confirmed during a 1990 re-examination conducted by FBI lab examiners, Michael P. Malone and Robert F. Webb (A 3935-52), who determined that these fibers are made of "saran" (A 3941-42; A 3951).

The record contains a factual dispute about whether saran was used in the manufacture of women's wigs, or solely for other purposes such as doll and mannequin hair. The government evidence that saran fibers were not used in women's wigs but solely to manufacture "wigs for dolls and manikins" (A 4200) relied upon a selection of what it termed "standard references" which it claimed indicated that saran was not used in women's wigs. FBI lab examiner Paul Malone opined:

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[10] Photos of the crime scene indicate that the clear-handled hairbrush was on a sidetable in the living room/dining area a few feet from the kitchen telephone. Stoeckley said she answered that phone during the invasion of the MacDonald home. (A 1637). The defense found the person who says he made the phone call that Stoeckley answered. (A 0865) None of this evidence was presented to the jury.

In addition to performing physical examinations in this case, I have consulted numerous standard references (see Exhibits 1-6 attached to this affidavit) which are routinely used in the textile industry and as source material in the FBI Laboratory, concerning the industrial applications for fibers, including saran. None of these standard references reflect the use of saran fibers in cosmetic wigs; however, they do reflect the use of saran fibers for wigs for dolls and manikins, in addition to such uses as dust mops and patio screens.

Further, based upon my own investigation and research in this case, I can state that saran has the following physical characteristics which make it unsuitable for use in cosmetic wigs, in which the objective is to have the wig hair appear indistinguishable from natural human hair. Saran is very straight, is only manufactured as a continuous monofilament, does not lay or drape like human hair. Lastly, saran cannot be manufactured as a "tow" fiber, which is essential to the cosmetic wig manufacturing process.

Based on these factors described above, and in the absence of any evidence to the contrary, I conclude that the 22 inch and 24 inch blond saran fibers are not cosmetic wig fibers.

(A 4200-01) (footnotes omitted) (emphasis added).

Only one of the six "standard references" cited by Malone support his conclusion that saran was used only for manikin or doll hair. This source, *Introductory Textile Science* by Marjorie L. Joseph, was published in 1966, four years prior to the murders. (A 4200, 4203-4206). Malone's five other "standard references" make no mention of saran use in either doll's hair or wigs. Significantly, none of these texts cited by Malone were

published contemporaneously with the murders. Five texts cited by Malone have publication dates of 1963, 1959, no date, 1981, and 1954 — well before or after the murders. (A 4203-4225)

On the other hand, the texts relied upon as evidence by petitioner but not cited by Malone, were published in 1969 and 1970, respectively, closer in time to the February 17, 1970 murders. These texts have the following listings for saran[11]:

> Saran: Fil. yarn, tow for dolls' hair, wigs, ENJAY; monofil, SPARK-L-ITE; USA licensees: Enjay Fibers [emphasis added][12]

A. Dembeck, *Guidebook to Man-Made Textile Fibers and Textured Yarns of the World* (United Piece Dye Works, 3d ed., 1969) at 210.

* * *

> In its various forms, [saran] is used for auto upholstery and seat covers, . . . wigs and doll hair, . . . and numerous other things [emphasis added]

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[11] The controverted nature of the government's evidence could not have escaped the Court of Appeals' attention. Petitioner cited his standard text evidence in his Reply Brief filed with the Court of Appeals, at 14, n.16; during oral argument before that Court; and in a post-argument letter circulated to the panel.

[12] Another significant controverted item of evidence is the non-text basis of the FBI analyst's opinion, in which he stated that "saran cannot be manufactured as a 'tow' fiber, which is essential to the cosmetic wig manufacturing process". (A 4201) The Dembeck text submitted by petitioner states that saran was manufactured in the form of both filament and tow. A. Dembeck, *Guidebook to Man-Made Textile Fibers and Textured Yarns of the World* (United Piece Dye Works, 3d ed., 1969) at 81, 210. Tow is a "loose essentially untwisted strand of synthetic fibers". *Webster's Ninth New Collegiate Dictionary* (Merriam-Webster, Inc. 1984) at 1248.

E. Stout, *Introduction to Textiles*, (John Wiley & Sons, Inc., 3d Ed., 1970), at 238.

Moreover, Malone states that his opinion that "the 22 inch and 24 inch blond saran fibers in this case are not cosmetic wig fibers" was conditional: "in the absence of any evidence to the contrary." (A 4201) MacDonald submitted "evidence to the contrary" in the form of texts which were not cited by Malone and not considered by him when he rendered his opinion. Significantly, petitioner supported his "colorable showing of factual innocence" with evidence in a "standard text" that, contrary to the government's evidence, saran was extruded by manufacturers in the form of a tow at the relevant time.

Both texts submitted as evidence by the defense contradict the government's evidence that the uses of saran did not include women's wigs. The Court of Appeals may not, consistent with § 2255 and *Machibroda*, dismiss petitioner's two texts, published contemporaneously with the murders, as "specious evidence", but rely on the government expert's opinion based on text evidence about the origins of the blond synthetic fibers, especially when the expert conditioned the validity of his opinion on "the absence of any evidence to the contrary."

**2. Black Wool Fibers Found on the Body of Colette MacDonald and On the Wooden Club Murder Weapon.**

In late 1978 and early 1979, prosecutor Brian Murtagh, preparing for trial, requested that the FBI re-do tests on certain hair and fiber exhibits which prior examinations had failed to match with known sources. (A 1685-89) James Frier, the technician who conducted these re-examinations, compiled lab notes which documented his discovery of black wool fibers — which he could not match to any source in the home — on Mrs.

MacDonald's mouth and arm, and on the wooden club used to murder her. (A 1714-15)

The 1990 re-examination by FBI lab examiner Malone confirmed Frier's 1979 findings. (A 3945-47) The government maintained that these unmatched wool fibers were insignificant household debris. (A 3939) While normally the presence of unmatched fibers might not be significant, here, where MacDonald had reported that intruders attacked his family (after which they presumably left the apartment wearing the wig and garments which would have shed hairs and fibers), the presence of fibers unmatched to any known source in the home is evidence of the presence of the intruders MacDonald described.

**E. The Requirement of an Evidentiary Hearing.**

Petitioner maintained below[13] that, while the courts could grant him relief based on the written record, they could not find against him solely on the controverted evidence in that record, without convening an evidentiary hearing at which petitioner would have had an opportunity to demonstrate, *inter alia*:

1. that the passages concerning uses of saran in the standard texts cited by him constituted the "contrary evidence" which FBI analyst Malone stated was "absent"

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[13] Petitioner requested an evidentiary hearing in the District Court, Pet. Reply Brf. at 3 n.4, 89-90; the Court of Appeals, Pet. Brf. at 1, 19, 30 n.38, 57 n.72.; during oral argument before the Court of Appeals, and in the February 6, 1992, post-argument letter circulated to the panel:

> In the event that this Court is not satisfied that [these standard references] sufficiently disposes of the question of whether or not saran is used for making "wigs", rather than only doll or mannequin wigs — and that the resolution of this factual issue actually makes a difference — we respectfully submit that the issue can be resolved only with an evidentiary hearing. [footnote omitted]

when he opined that the blond saran fibers found at the crime scene were not from a woman's cosmetic wig;

2. that the passages concerning the uses of saran in petitioner's texts were based on reliable current research, as of the relevant 1969-70 period, concerning use of saran in women's wigs;

3. that the standard texts cited by the government were published at times more remote from the murders, and were therefore less reliable evidence concerning the origin of the fibers found at the scene;

4. that Malone's opinion that "saran cannot be manufactured as a 'tow' fiber, which is essential to the cosmetic wig manufacturing process" (A 4201), is effectively rebutted by petitioner's standard text;

5. that Glisson had a good basis for her conclusion that the blond fibers were "made to look like hairs"; and

6. that the black wool found on the body of the victim and on the club murder weapon was more probative of the presence of intruders than the findings of petitioner's pajama fibers on the club were probative of petitioner's guilt.[14]

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[14] The government claimed that the presence of MacDonald's pajama fibers on the club showed that he beat his family with the club. Petitioner, however, consistently maintained that he had been beaten by the club, which would have accounted, of course, for his pajama fibers being found on it. (A 0239-40, 0256-58, 0273-74, 0554-56, 0618-19, 4296-97)

## REASONS FOR GRANTING THE PETITION

### I. THE COURTS BELOW VIOLATED TITLE 28 U.S.C. § 2255 AS INTERPRETED BY *MACHIBRODA V. UNITED STATES*, 368 U.S. 487 (1962), BY IMPROPERLY REFUSING TO HOLD AN EVIDENTIARY HEARING ON DISPUTED ISSUES OF MATERIAL FACT WHICH WERE DISPOSITIVE OF PETITIONER'S CLAIM OF "FACTUAL INNOCENCE".

This case raises the important federal question of how a § 2255 court is to determine whether a petitioner has established that there has been a "miscarriage of justice", where the record shows controverted evidence concerning facts which are determinative of that issue.

Title 28 U.S.C. § 2255 requires a district court to hold an evidentiary hearing in order to resolve controverted issues of material fact which are dispositive of the merits of a § 2255 claim. *Machibroda v. United States*, 368 U.S. 487, 494 (1962). However, in this case the courts below denied petitioner's right to such a hearing on the merits, by accepting at the jurisdictional stage, without an evidentiary hearing, the government's submission that the blond synthetic hairlike fibers and black wool fibers were not evidence of the presence of intruders in the MacDonald home, because the fibers may have originated from sources other than those proven by petitioner's evidence.[15]

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[15] For example, the Court of Appeals impermissibly and summarily credited the government's evidence, when it stated that "the origins of the hair and fiber evidence have several likely explanations other than intruders." (pp. 12a, *below*)

Without in any way conceding that his petition's evidentiary submissions are less "likely" to be true than the government's, MacDonald submits that this Court's holding in *Machibroda* expressly prohibits a § 2255 court from summarily rejecting, without an evidentiary hearing, a petitioner's non-frivolous evidentiary submissions, even if it can, in advance of a hearing,

Had these fact findings been made summarily in deciding the merits of petitioner's constitutional claims — rather than in deciding jurisdictional facts — § 2255 clearly would have been violated. However, the courts below made them at the jurisdictional stage, when determining whether petitioner had made out a "colorable showing of factual innocence" such as would allow him to overcome the "abuse of the writ" bar of *McCleskey v. Zant*, ___U.S.___, 111 S.Ct. 1454, 1471 (1991).

**A. The Progression Toward Uniformity, Rationality, and Fundamental Justice.**

A primary reason for granting the writ in this case is to assure that the lower federal courts employ fact-finding procedures that "advance uniformity in the law of *habeas corpus*". *Keeney v. Tamayo-Reyes*, ___U.S.___, 112 S.Ct. 1715, 1719-20 (1992). In *Tamayo-Reyes*, this Court held that a *habeas* court must apply a uniform standard to decide whether it will consider a petitioner's claim, and to the different question of whether it should hold an evidentiary hearing with respect to the reasons for the petitioner's failure to develop facts supporting his claim in earlier proceedings. In this case, the Court should issue the writ in order to resolve whether the same standard which determines whether an evidentiary hearing is required to decide determinative facts on the merits of petitioner's constitutional claim must also be used to determine whether to grant an evidentiary hearing when deciding dispositive, jurisdictional facts.

The *Tamayo-Reyes* opinion traced this Court's progression toward the achievement of rationality and uniformity in setting the standards which define the scope of *habeas corpus*

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articulate good reasons to credit the government's evidentiary submissions rather than those of the petitioner.

jurisdiction, in a series of rulings beginning with *Francis v. Henderson*, 425 U.S. 536 (1976) ("cause and prejudice" standard applied to procedural defaults in state proceedings) and ending with *McCleskey v. Zant*, *supra*, ("cause and prejudice" standard applied to § 2254 abuse of writ determinations) and *Coleman v. Thompson*, ___U.S.___, 111 S.Ct. 2546 (1991) ("cause and prejudice" standard applied to failures to appeal at state level).

Because of the language in 28 U.S.C. § 2255 and the critical role that fact finding plays in the adjudication of collateral attacks on federal criminal convictions — which are not appellate proceedings, but original civil proceedings — this Court ruled thirty years ago that an evidentiary hearing must be held, when evidence submitted by a petitioner, if taken to be true, would entitle him to relief on the merits of his constitutional claim. *Machibroda v. United States*, *supra*, 368 U.S. at 496. Granting the writ in this case would advance uniformity and rationality in the administration of collateral attacks on federal criminal convictions. It would also assure elemental justice for innocent federal convicts by providing an occasion for this Court to rule that the *Machibroda* standard for deciding whether to convene an evidentiary hearing applies with equal force when a petitioner presents evidence in support of his claim that a federal court has jurisdiction to consider his constitutional claims, because he has made a "a colorable showing of factual innocence".

**B. <u>McCleskey's Factual Innocence Exception</u>.**

In *McCleskey*, *supra*, this Court adopted the cause and prejudice test for determining abuse-of-the-writ claims in connection with second § 2254 petitions. Recognizing the impact that this standard would have on the ability of lower federal courts to reach the merits of claims made in such

petitions, this Court expressly recognized the importance of having a "safety valve", which would be both "narrow" and yet adequate to protect the innocent convict from having the proverbial key thrown away. The interests of finality, in short, were still to be tempered with a "narrow exception" which would be adequate to assure elemental justice.[16]

Hence, this Court held that a petitioner bringing a second or subsequent § 2254 petition is entitled to have his claims addressed on the merits, despite his failure to establish adequate cause and prejudice, in those instances where the claims raise a "colorable showing of factual innocence":

> Federal courts retain the authority to issue the writ of *habeas corpus* in a further, narrow class of cases despite a petitioner's failure to show cause for a procedural default. These are extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime. We have described this class of cases as implicating a fundamental miscarriage of justice.
>
> * * *
>
> [Even] [i]f petitioner cannot show cause, failure to raise the claim in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim.

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[16] This safety value is fundamental to both §§ 2254 and 2255 jurisprudence. Indeed, but for its assurance of protection of the factually innocent litigant with a constitutional claim, it is doubtful that *McCleskey* would have commanded a majority of this Court.

*McCleskey*, 111 S.Ct. at 1470 (emphasis added).[17]

The standard for determining whether an evidentiary hearing must be held to decide facts dispositive of whether a petitioner has made a "colorable showing of factual innocence" is vital to the effective functioning of the "narrow" yet adequate dimensions of the "safety valve" in § 2255 cases, because it controls the accuracy and fairness of the factfinding mechanism which actuates the opening and closing of the valve. *See Harris v. Reed*, 489 U.S. 255, 271 (1989) (O'Connor, J., concurring).

**C. The Evidentiary Hearing Requirement in 28 U.S.C. § 2255 Applies With Equal Force When a Court Makes Dispositive Fact Findings, Based on Controverted Evidence, Concerning a § 2255 Petitioner's Claim That He Has Made a "Colorable Showing of Factual Innocence", During Its Jurisdictional Inquiry.**

In its reaffirmance of the existence of the factual innocence exception for state *habeas* petitioners, this Court in *McCleskey v. Zant*, *supra*, 111 S.Ct. at 1471, provided no guidance as to how a lower federal court is to decide disputed questions of material fact which are dispositive of whether a federal prisoner, alleging a "miscarriage of justice" under *Sanders v. United States*, 373 U.S. 1 (1963), has satisfied that standard in his second § 2255 petition. This was understandable, since McCleskey was not a federal prisoner and did not proffer a fact-based colorable claim of innocence. Rather, McCleskey was a § 2254 petitioner who contended that his self-incriminating statements had been illegally obtained.

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[17] In emphasizing that a claim of "factual innocence" overrides all other considerations, *McCleskey* reaffirmed and strengthened the "ends of justice" consideration of *Sanders v. United States*, 373 U.S. 1 (1963).

This absence of guidance from *McCleskey* is, however, particularly problematic where, as here, non-frivolous affirmative, physical evidence of factual innocence is presented in support of a second § 2255 petition, and where the very facts which would require that a petitioner be granted an evidentiary hearing on the merits, are summarily weighed and decided against petitioner during the jurisdictional inquiry, thereby depriving him of a *Machibroda* evidentiary hearing on the merits.

The same considerations which supported the *Machibroda* Court's ruling that contested issues of dispositive fact require resolution in an evidentiary hearing to decide the merits, would support this Court's ruling here that a hearing is required under § 2255, where the record discloses controverted evidence creating genuine fact issues dispositive on the question of whether the court has jurisdiction.

**D. The Rulings and Record Below Raise the Questions Presented in this Petition.**

Neither of the opinions below treated the evidence submitted by petitioner as true, nor stated that petitioner's evidence was insufficient as a matter of law to establish a "colorable showing of factual innocence". On the contrary, the Court of Appeals affirmed the District Court's summary acceptance of the government's controverted evidence on the dispositive issue of the origins of the synthetic blond and black wool fibers:

> The evidence raised here, when considered with all the trial evidence, simply does not rise to a "colorable showing of factual innocence" necessary to show a fundamental miscarriage of justice. It neither supports MacDonald's account of the murders nor discredits the government's theory. The most that can be said about the evidence is that

> it raises speculation concerning its origins. Furthermore, the origins of the hair and fiber evidence have several likely explanations other than intruders. The evidence simply does not escalate the unease one feels with this case into a reasonable doubt.

(p. 12a, *below*)

The Court's reliance on "likely explanations other than intruders" was precisely the summary crediting of the government's evidence over petitioner's evidence, which is prohibited by § 2255 and *Machibroda*. Most obviously, the Court of Appeals could not have treated, as if true, petitioner's evidence consisting of two texts showing that saran was used for wigs prior to 1970, and also discount (as it did) his submissions as "specious evidence" that the blond saran fibers came from a woman's wig. (p. 13a, *below*)

The dispositive nature of the controverted evidence concerning the origins of the fibers identified in the government's laboratory notes is established by the prior opinions in this case, and hence must be considered, in effect, the "law of the case".

The District Court in 1985 noted that the absence of forensic evidence corroborating MacDonald's account devastated the defense case:

> MacDonald's account of the murders found little, if any, support from the physical evidence gathered by investigators at the crime scene.

*United States v. MacDonald*, 640 F. Supp. 286, 315 (E.D.N.C., 1985).

The District Court went on to note that not only did the physical forensic evidence contradict MacDonald's account and thereby demonstrate him to be a liar, but the absence of forensic evidence to corroborate Stoeckley's presence at the crime scene undermined defense efforts to admit into evidence witnesses to whom Stoeckley had confessed:

> More importantly, no physical evidence was uncovered at the crime scene which would support Stoeckley's confessions. [*Id.* at 323.]

The Court of Appeals agreed that the lacuna in MacDonald's argument for the admissibility of the Stoeckley "hearsay" witnesses was the absence of corroborative proof of the reliability of Stoeckley's confessions:

> We have no difficulty in agreeing with appellant that declarant Stoeckley was unavailable and that her statements, if true, clearly would be against her penal interest. The question remains, however, whether the "corroborating circumstances clearly indicate the trustworthiness of the statement[s]." As corroborating circumstances, MacDonald adverts to the fact that Stoeckley owned and regularly wore boots, a blond wig, and a floppy hat, thus permitting her to fit the description of the female assailant described by the defendant.

*MacDonald*, *supra*, 688 F.2d at 233.

But the Court held that MacDonald did not demonstrate sufficient corroborating circumstances to establish the trustworthiness of Stoeckley's confessions:

> At bottom, the sticking point here, as recognized by the District Court, is the fundamental problem of trustworthiness. While MacDonald is able to point to a number of corroborating circumstances, he does not demonstrate, finally that they make Stoeckley's alleged declaration trustworthy...[and] our conviction is that the District Court was not in error in adjudging that defendant failed to carry his burden under Rule 804(b)(3). [*Id.*]

The Court of Appeals further noted that had the jury heard Stoeckley's confession, "the injury to the government's case would have been incalculably great." *United States v. MacDonald*, 632 F.2d 258, 264 (4th Cir. 1980).

There thus can be no doubt that the lab note evidence — if it in fact demonstrated that the source of the 22-inch blond synthetic hairlike fibers was a woman's wig such as that worn by Helena Stoeckley, and that the unmatched black wool fibers emanated from intruders — would have demonstrated that MacDonald's account was true, that he is innocent, and that there has been a miscarriage of justice.

## II. THE APPLICATION OF *McCLESKEY*'s "CAUSE AND PREJUDICE" TEST AS A BAR TO REVIEW OF THE MERITS OF PETITIONER'S 28 U.S.C § 2255 PETITION WAS ERRONEOUS BECAUSE CONSIDERATIONS OF FEDERALISM AND COMITY ARE NOT IMPLICATED IN A FEDERAL CRIMINAL CASE.

Recent restrictions of federal *habeas* review of state convictions rely, in substantial part, on the ground that "finality has special importance in the context of a federal attack on a state conviction". *McCleskey v. Zant*, ___U.S.___, 111 S.Ct. 1454, 1469-70 (1991). Yet here, without noting the differences between § 2254 and § 2255 jurisdiction, the courts below applied these § 2254 restrictions to a § 2255 review of a federal conviction.[18]

Heretofore, abuse-of-the-writ claims made in § 2255 proceedings were evaluated by the standards announced in *Sanders v. United States*, 373 U.S. 1 (1963). *Sanders* applied a "deliberate bypass" standard to second § 2255 petitions which raised claims not presented in the prior petition. *Id.* at 18.

However, in *McCleskey*, the Court held that in § 2254 cases "[a]buse of the writ is not confined to instances of deliberate abandonment," 111 S.Ct. at 1467, and that the "principle [of inexcusable neglect] also governs in the abuse of the writ context." *Id.* at 1467-68, *citing*, *Sanders v. United States*, *supra*, 373 U.S. at 18. Relying heavily upon the need for deference to state court procedure and factfinding, the Court

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[18] Only one Court of Appeals has expressly considered the issue of McCleskey's application to § 2255 cases. *Andiarena v. United States*, No. 91-1943, slip op. at 4-5 (1st Cir. June 26, 1992) (*McCleskey* applied under § 2255). Petitioner raised this issue in the Court of Appeals, Petition for Rehearing at 11-13, and in the District Court, Reply Brf. at 74-5, fn. 57.

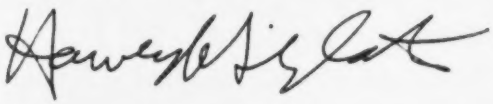
further held that the "cause and prejudice" standard "used to determine whether to excuse state procedural defaults should govern the determination of inexcusable neglect in the abuse of the writ context," *McCleskey, supra*, 111 S.Ct. at 1468.

The federalism and comity considerations underlying *McCleskey* are non-existent in the instant § 2255 case. In view of the absence of federalism concerns here, this Court should issue the writ to review the Court of Appeals' decision to apply *McCleskey*'s "cause and prejudice" standard in determining whether petitioner's second § 2255 petition constitutes an abuse of the writ.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Harvey A. Silverglate
(Counsel of Record)
Andrew Good
Philip G. Cormier
Silverglate & Good
89 Broad Street, 14th Floor
Boston, Massachusetts 02110
(617) 542-6663
(617) 451-6971 - Telecopier

DATED: October 7, 1992

# APPENDICES

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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UNITED STATES OF AMERICA,
Appellee,

v.

JEFFREY R. MacDONALD,
Defendant-Appellant.

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No. 91-6613.

Argued: February 5, 1992.
Decided: June 2, 1992.

Before RUSSELL and MURNAGHAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

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Harvey A. Silverglate, Silverglate & Good, Boston, Mass., and Alan M. Dershowitz, Cambridge, Mass., argued (Philip G. Cormier, Thomas C. Viles, Andrew Good, Silverglate & Good, Boston, Mass.; Roger C. Spaeder, David A. Hickerson, Zuckerman, Spaeder, Goldstein, Taylor & Kolker; Anthony P. Bisceglie, Bisceglie & Walsh, Washington, D.C.; Norman B. Smith, Smith, Follin & James, Greensboro, N.C.; and John J.E. Markham, II, Santa Clara, Cal., on brief), for defendant-appellant.

John Fichter DePue, Crim. Div., U.S. Dept. of Justice, Washington, D.C., argued (Robert S. Mueller, III, Asst. Atty. Gen., James S. Reynolds, Chief, Terrorism and Violent Crime

Section, Laura Ross Blumenfeld, Crim. Div., U.S. Dept. of Justice, Washington, D.C., Margaret Person Currin, U.S. Atty., Brian M. Murtagh, Sp. Asst. U.S. Atty., and Eric Evenson, Asst. U.S. Atty., Raleigh, N.C., on brief), for plaintiff-appellee.

OPINION

DONALD RUSSELL, Circuit Judge:

Jeffrey MacDonald appeals the district court's denial of his petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2255 (1988). MacDonald seeks relief through a second habeas petition from his 1979 conviction for the murders of his wife and two daughters. He presents newly discovered evidence, which, he claims, the government suppressed at trial and which, he also claims, discredits the government's case against him and corroborates his exculpatory account of the murders. We find that MacDonald does not meet the stringent requirements of *McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), necessary to overcome dismissal of a second or subsequent collateral claim for abuse of the writ. He does not show sufficient cause for failing to raise this evidence in his first habeas petition. Neither does he persuade us that dismissal of the petition would result in a fundamental miscarriage of justice. Accordingly, we affirm that portion of the district court's opinion dismissing MacDonald's petition as an abuse of the writ and decline to reach the merits of his petition.

I.

We set forth briefly the circumstances of the murders and trial, providing only facts relevant to the newly discovered evidence raised here. The details of this case have been adequately presented in our several prior decisions. *See, e.g., United States v. MacDonald*, 688 F.2d 224 (1982); *United*

*States v. MacDonald*, 632 F.2d 258 (1980); *United States v. MacDonald*, 531 F.2d 196 (1976).

In the early morning of February 17, 1970, the wife and two young daughters of Captain Jeffrey MacDonald, an Army surgeon, were brutally murdered in their home on Fort Bragg Army base. Physical evidence found on the scene and analyzed by government forensic experts convinced federal investigators that MacDonald himself carried out the killings. The United States relied principally on this forensic evidence, and an absence of evidence corroborating MacDonald's story, to prove its case at trial.

MacDonald has consistently maintained his own account of the murders. He claims that a group of drug-crazed intruders, including a woman with blond hair, entered the house, murdered his family and injured him. Government investigators located a woman living locally named Helena Stoeckley, who generally met the description given by MacDonald. She told investigators that she could not remember her whereabouts the night of the murders because of heavy drug use. Her trial testimony was similarly inconclusive. The trial judge then refused to admit Stoeckley's out-of-court statements inculpatory of herself, which were offered into evidence by the defense, including recanted confessions, because Stoeckley proved too unreliable a witness.

A federal jury convicted MacDonald of the murders, and the convictions were affirmed on direct appeal.[1] Counsel for

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[1] This Court initially dismissed the conviction under the Sixth Amendment on the grounds that MacDonald had not been afforded a speedy trial. *United States v. MacDonald*, 632 F.2d 258 (1980). The Supreme Court then reversed dismissal, finding no Sixth Amendment violation. *United States v. MacDonald*, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982). On remand, the panel confirmed the conviction, denying the Sixth Amendment claim and various evidentiary claims. *United States v. MacDonald*, 688 F.2d 224 (1982), *cert. denied*, 459 U.S. 1103, 103 S.Ct. 726, 74 L.Ed.2d 951 (1983).

MacDonald then filed the first habeas petition in district court. The petition sought relief based on, *inter alia*, alleged suppression of exculpatory evidence by government prosecutors. The district court denied relief and we affirmed the denial. *United States v. MacDonald*, 640 F.Supp. 286 (E.D.N.C. 1985), *aff'd*, 779 F.2d 962 (4th Cir. 1985), and *cert. denied*, 479 U.S. 813, 107 S.Ct. 63, 93 L.Ed.2d 22 (1986).

On October 19, 1990, MacDonald filed a second habeas petition, at issue here, pursuant to 28 U.S.C. § 2255. MacDonald offered newly discovered, and allegedly exculpatory, evidence he claimed the government suppressed during trial in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In addition, MacDonald claimed that the government violated his due process rights by presenting its case in a manner intentionally designed to conceal this exculpatory evidence. The evidence consists of government forensic lab notes describing (1) three blond synthetic hairs found in a hairbrush located in the MacDonald home and (2) black and green wool fibers, not matched to any source in the MacDonald home, found on the murder weapon and on Colette MacDonald's body.[2]

MacDonald contends that the lab notes corroborate his story of intruders entering the home and murdering his wife and children. He has consistently maintained that one of the intruders was a woman with blond hair. Other evidence at trial showed that the suspected female intruder, Stoeckley, owned and often wore a cheap blond wig and may have been wearing it

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[2] Counsel for MacDonald challenges suppression of the lab notes themselves and not the actual physical evidence. Counsel concedes that the physical evidence alone does not offer conclusive proof of MacDonald's account of intruders. However, counsel asserts that the notes made by the government's own forensic experts showing unidentified, suspect evidence would have diminished the strength of the government's forensic case.

on the night of the murders.[3] Investigators located the hairbrush containing the blond hairs near the kitchen telephone in the MacDonald house. In a post-trial confession, Stoeckley recalled answering the MacDonald's telephone during the attacks and then hanging up after the caller asked for Dr. MacDonald.[4]

MacDonald also contends that evidence of various unidentified dark wool fibers found in Colette's mouth, on her arm, and on the wooden club used to murder her is further proof of intruders. These fibers were not matched to any tested source in the MacDonald home. Furthermore, Stoeckley was known to wear black and dark clothing.

Compounding the value of this evidence for MacDonald is the fact that the district court refused to admit Stoeckley's out-of-court confessions into evidence at trial. The court found her confessions untrustworthy due, in part, to the lack of corroborating evidence supporting the presence of intruders. MacDonald, of course, contends that had the lab notes been made known to the district court judge at the time of trial, the court would have allowed into evidence Stoeckley's out-of-court confessions. He further argues that the cumulative effect of the hair and fiber evidence and the confessions would have been a reasonable doubt in the minds of the jurors.

In reply, the government dismisses the evidence as inconsequential, just as it had done at the time of trial. According to one of its forensics experts, the three blond

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[3] Forensic experts have never been able to compare the blond hair strands to Stoeckley's wig because she burned the wig a few days after the murders.

[4] After MacDonald's conviction, Jimmie Friar, a mental patient of Dr. MacDonald's, corroborated Stoeckley's statement. He claimed to have called the MacDonald home at 2:00 a.m. on the morning of the murders, heard a woman answer the phone, and then heard a man in the background say, "Hang up the Goddamned phone."

synthetic hairs found in the brush were made of saran, an inexpensive substance generally used only in doll hair and mannequin wigs. The hairs differed from one another in chemical composition, indicating that they did not originate from the same source. Family photos show that the MacDonald girls owned several dolls, and they were known to brush the dolls' hair. The black and green wool fibers were only a few of several unidentified fibers found on Colette MacDonald and on the murder weapon. Because government experts considered these wool fibers forensically insignificant at the time of trial, they did not attempt to match them to any source in the MacDonald home. One government expert explained that a carpet or rug is particularly conducive to the transfer of fibers, leading the government to conclude during its investigation that the unidentified fibers likely came from contact with one of the carpets in the MacDonald house.

The government further argues that the court still would not have admitted Stoeckley's out-of-court confessions had it known of the evidence presented in this appeal. The government asserts that Stoeckley's mental instability due to prolonged, heavy drug use and her unreliable character were the primary reasons for not admitting the confessions, reasons unchanged by the new evidence.

Moreover, the government claims that MacDonald is now procedurally barred from raising this claim because MacDonald's counsel had possession, if not actual knowledge, of the lab notes at the time of his prior collateral appeal.[5] In

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[5] MacDonald's trial counsel has had access to the physical evidence since before the original trial. Present counsel argues that access should not impute knowledge because the physical evidence of blond synthetic hair and woolen fibers was effectively hidden from MacDonald. It was among thousands of pieces of physical evidence filling an entire jail cell. We do not address this dispute since it is the lab notes, and not the physical evidence itself, that

1983-84, in preparation for MacDonald's first collateral appeal, counsel requested and received copies of investigation files from the Army Criminal Investigation Division (CID), the Department of Justice, and the FBI. The files contained lab notes of CID Chemist Janice Glisson describing the blond synthetic hairs and lab notes reflecting the presence of black and green wool fibers. All documents were date stamped upon receipt by MacDonald's counsel, providing evidence that these particular lab notes were actually received in 1983-84. In fact, that portion of Janet Glisson's lab notes discussing the blond synthetic hair was tagged and annotated by defense counsel, showing that a member of the defense team had at least seen and considered the evidence. These are the same documents which present counsel for MacDonald now introduces as newly discovered evidence.

The district court agreed with the government. It issued an exhaustive Memorandum of Decision, carefully addressing and rejecting on the merits each argument raised in this collateral appeal. *United States v. MacDonald*, 778 F.Supp. 1342 (E.D.N.C. 1991). Although the court found the petition procedurally barred under *McCleskey v. Zant* as an abuse of the writ, it nevertheless addressed the merits of MacDonald's claims in an effort to ensure justice in this highly public and controversial case. Ultimately, the court based its denial on a finding that the evidence would not have produced a different jury verdict if known to defense counsel at the time of trial.

MacDonald now appeals the district court's denial of his habeas petition.

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MacDonald now brings into issue.

II.

As the following discussion will explain, we find the abuse of the writ doctrine, as defined in *McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), sufficient grounds for disposing of MacDonald's habeas petition.[6] We feel confident that the doctrine, as applied in this case, provides adequate safeguards against dismissal of any truly meritorious claims.[7]

Courts have developed the abuse of the writ doctrine in order to curtail endless filings of successive habeas petitions. Successive petitions strike at the finality of a judgment. "Neither innocence nor just punishment can be vindicated until the final judgement is known." *McCleskey*, 111 S.Ct. at 1468-

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[6] Without deciding whether or not *McCleskey* announces a new rule, we find no retroactivity issue here. *See Harris v. Vasquez*, 949 F.2d 1497, 1512 (9th Cir. 1991) (*McCleskey* does not announce new rule), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1275, 117 L.Ed.2d 501 (1992); *Andrews v. Deland*, 943 F.2d 1162, 1172 n.7 (10th Cir. 1991) (*McCleskey* does not announce a new rule of substantive law), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1213, 117 L.Ed.2d 451 (1992); *McCleskey*, 111 S.Ct. at 1477 (Marshall, J., dissenting) (majority opinion announces new rule). Recently, a majority of the Supreme Court extended application to the civil context the rule that new rules applied retroactively in the deciding case should be applied retroactively to similar pending cases. *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S.Ct. 2439, 2446, 115 F.Ed.2d. 481 (1991); *see Howard v. Haddad*, 962 F.2d 328, 330 (4th Cir. 1992). Here, the Supreme Court decided *McCleskey* on April 16, 1991, while MacDonald's second habeas petition was still pending before the district court. The district court did not decide the fate of MacDonald's petition until July 8, 1991. Application of *McCleskey* here complies with *Beam* and furthers justice by treating similarly situated parties, i.e., McCleskey and MacDonald, in the same manner. *See Beam*, 111 S.Ct. at 2446.

[7] We have considered MacDonald's substantive claims and the district court's disposition of those claims. We do not find it necessary to reach, and, therefore, refrain from exhaustive discussion of, those substantive claims.

69. Further concerns for the allocation of scarce judicial resources underlie the abuse of the writ doctrine. *Id.* at 1469.[8]

The Supreme Court clarified the restrictions on bringing second and subsequent habeas petitions in its *McCleskey* decision. As stated in that case, the abuse of the writ doctrine "in general prohibits subsequent habeas consideration of claims not raised, and thus defaulted, in the first federal habeas proceeding." *Id.* at 1468. The government bears the initial burden of pleading abuse of the writ. It meets its burden by identifying particular claims not raised in a prior habeas petition and asserting abuse of the writ. The burden then shifts to the petitioner, in order to avoid dismissal, to show that failure earlier to raise such claims may be excused under one or two narrow exceptions. Under the first exception, a petitioner can overcome dismissal upon a showing of cause for not raising the claim previously and a showing of prejudice. If petitioner fails to meet the first exception, a court can review the petition only upon a showing "that a fundamental miscarriage of justice would result from a failure to entertain the claim." *Id.* at 1470.

The first exception is not easily met. In asserting a "cause and prejudice" justification, petitioner must show cause by "'some objective factor external to the defense[,] [which] impeded counsel's efforts' to raise the claim . . ." in a prior habeas petition. *McCleskey*, 111 S.Ct. at 1470 (quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986)). Examples given by the Court of cause are government interference with raising a claim or

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[8] Federal statutes governing successive habeas petitions do not foreclose application of the judicially created abuse of the writ doctrine, under which we decide this case. *See* 28 U.S.C. §§ 2244(a), 2255 (1988). The statutes codify the basic principles of the judicially created doctrine but "do[] not state the limits on the district court's discretion to entertain abusive petitions." *McCleskey*, 111 S.Ct. at 1466.

unavailability of facts necessary to make such a claim. *McCleskey*, 111 S.Ct. at 1470. Negligence or error in failing to raise a claim are not sufficient to show cause. Likewise, "[a]ttorney error short of ineffective assistance of counsel . . . does not constitute cause . . ."[9] *Id.* Once cause is established, petitioner must then show actual prejudice.

If the petitioner fails to establish cause, a court may still entertain the habeas petition in extraordinary cases where failure to do so would result in a fundamental miscarriage of justice. This is a narrower exception intended only to relieve from conviction one who is factually innocent of a crime. *Id.* A petitioner can satisfy this exception only where he or she makes a "colorable showing of factual innocence." *Id.* at 1471 (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 454, 106 S.Ct. 2616, 2627, 91 L.Ed.2d 364 (1986)). That is, a petitioner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted . . . and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt." Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 160 (1970); *see McCleskey*, 111 S.Ct. at 1470; *Kuhlmann*, 477 U.S. at 454-55 n.17, 106 S.Ct. at 2627 n.17 (adopting Judge Friendly's explication).

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[9] But note that where no Sixth Amendment right to counsel attaches to the proceeding, an ineffective assistance claim cannot be sustained. Prisoners have no right to counsel in a collateral proceeding. *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S.Ct. 1990, 1993, 95 L.Ed.2d 539 (1987). Therefore, attorney error in an initial habeas proceeding cannot serve as cause to review subsequent petitions.

III.

We now apply the abuse of the writ doctrine to the case before us. The parties do not dispute that the government has satisfied its initial burden of proof by properly pleading abuse of the writ. Our first determination, then, is whether MacDonald has shown cause for not raising this newly discovered evidence in his prior habeas petition. We easily conclude that he has not. Lab notes relating to the blond hairs, now claimed significant in corroborating MacDonald's account of the murders, were seen and passed over by counsel in the previous habeas appeal. As found by the district court, a law clerk had tagged the relevant lab report and brought it to the attention of the legal team working on the first habeas petition. Members of the team considered its evidentiary significance and made a tactical decision not to use the evidence. Such deliberate bypass clearly cannot survive abuse of the writ analysis on a second habeas appeal. *See McCleskey*, 111 S.Ct. at 1467, 1471. Although such decision by counsel may in retrospect be deemed attorney error, erroneous strategic decisions do not amount to cause. *See supra* note 9.

MacDonald similarly fails to show cause for not raising in his first habeas petition the lab notes pertaining to the dark wool fibers. The lab notes were in the possession of MacDonald's counsel in 1983-84, prior to the filing of the first petition, as evidenced by a date received stamp. Even though these notes may not have been known to MacDonald's counsel, abuse of the writ is not confined to deliberate decisions to bypass information. "[A] petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice." *McCleskey*, 111 S.Ct. at 1468. Thus, if a petitioner should have known and understood the significance of evidence through reasonable investigations prior

to filing a first habeas petition, such petitioner has no cause for not then raising the claim. We find that MacDonald's first habeas counsel, through reasonable and diligent investigation, should have discovered the lab notes in their possession. No external force, beyond the control of MacDonald and his defense team, interfered with discovery. We will not excuse as cause failure to review and consider the significance of evidence within counsel's possession.

MacDonald's counsel argues that government concealment of this evidence at trial prevented counsel from later discovering and then raising the evidence in the first habeas petition. While MacDonald may have an argument for cause at trial, the argument is inapposite here. Counsel's possession of the relevant documents prior to the first habeas petition negated any concealment claim. We find that MacDonald has made no credible showing of cause.

Having dispensed with the cause and prejudice exception, we now determine whether MacDonald has shown that dismissal of his petition would result in a fundamental miscarriage of justice. This is a difficult showing to make. Courts are instructed to grant review under this exception only in "extraordinary instances." *McCleskey*, 111 S.Ct. at 1470. We find that this case does not constitute such an instance. The evidence raised here, when considered with all the trial evidence, simply does not rise to a "colorable showing of factual innocence" necessary to show a fundamental miscarriage of justice. It neither supports MacDonald's account of the murders nor discredits the government's theory. The most that can be said about the evidence is that it raises speculation concerning its origins. Furthermore, the origins of the hair and fiber evidence have several likely explanations other than intruders. The evidence simply does not escalate the unease one feels with this case into a reasonable doubt.

We have carefully reviewed the voluminous record of evidence in this case, beginning with the original military Article 32 proceedings through the present habeas petition, which contains over 4,000 pages. Yet we do not find anything to convince us that the evidence introduced here, considered with that previously amassed, probably would have raised reasonable doubts in the minds of the jurors.

We are persuaded that this is precisely the type of collateral appeal the Court through *McCleskey* intended to obstruct and deter. Here, over twenty years after the event of the crime, MacDonald reopens his case with specious evidence. While we are keenly aware of MacDonald's insistence as to his innocence, at some point we must accept this case as final. Every habeas appeal MacDonald brings consumes untold government and judicial resources. Furthermore, successive appeals of little merit must cruelly raise and then disappoint the hopes of one, like MacDonald, faced with a long term of incarceration. We feel that our review of MacDonald's case through the mechanism of the abuse of the writ doctrine has been thorough and fair. Any evidence truly pointing to MacDonald's innocence would have prompted a review on the merits by this Court.

## CONCLUSION

Finding that MacDonald's second habeas petition constitutes an abuse of the writ, we affirm the district court's order denying the petition.

AFFIRMED.

**APPENDIX B**

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

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UNITED STATES OF AMERICA,
Plaintiff,

v.

JEFFREY R. MacDONALD,
Defendant.

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Nos. 75-26-CR-3, 90-104-CIV-3-D

Decided: July 8, 1991

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Brian Murtagh, Sp. Asst. U.S. Atty., Eric Evenson, Asst. U.S. Atty., Raleigh, N.C., John F. DePue, Crim. Div., U.S. Dept. of Justice, Washington, D.C., for U.S.

Harvey Silverglate, Philip Cormier, Boston, Mass., Norman Smith, local counsel, Greensboro, N.C., for Jeffrey R. MacDonald.

MEMORANDUM OF DECISION

DUPREE, District Judge.

Jeffrey R. MacDonald, who is serving three consecutive life sentences for the murders of his wife and two children, filed a

petition for a writ of habeas corpus on October 19, 1990 pursuant to 28 U.S.C. § 2255 seeking to vacate his conviction on the grounds that the prosecution failed to disclose prior statements of witnesses at trial, withheld laboratory notes written by government agents which would have aided the defense, and exploited the suppression of the prior statements and lab notes by knowingly presenting a false and perjurious picture of the evidence and underlying facts. The government has responded that it fully complied with its duty to disclose exculpatory evidence and prior statements and that in any case, the allegedly suppressed evidence would not have altered the jury's verdict. The government further argues that MacDonald should be barred from raising these claims at this time since the information upon which the instant petition is based was in MacDonald's possession in 1984 when a previous petition for a writ of habeas corpus was filed. The court has allowed numerous extensions of time in which to file pleadings and has waived the normal page limitations so that both sides could adequately present their respective positions. Having considered the voluminous pleadings, affidavits, and exhibits, and the arguments of counsel at a hearing on June 26, 1991, the court finds for the reasons which follow that MacDonald's petition must be denied.

## I. FACTS AND PROCEDURAL HISTORY

In the court's twenty years on the bench, no other case has been the subject of more public and judicial scrutiny than this one. Virtually every aspect of the case has been detailed in eleven reported judicial opinions, a best-selling book, a television drama, various documentaries, and countless articles and news reports. Although more than twenty years have passed since the murders, interest in the case remains seemingly unabated, as evidenced by the fact that even minor scheduling

orders prompt calls to the court from local and national press organizations.

The facts of the case and prior proceedings have been previously reported and will not be fully repeated here. *See United States v. MacDonald*, 531 F.2d 196 (4th Cir. 1976) (pre-trial ruling that four-year delay between dismissal of military charges and subsequent federal indictment violated constitutional right to speedy trial), *rev'd*, 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978) (holding that defendant may not appeal order denying motion to dismiss on speedy trial grounds before trial); *United States v. MacDonald*, 585 F.2d 1211 (4th Cir. 1978) (Fifth Amendment guarantee against double jeopardy does not bar federal prosecution following Article 32 hearing resulting in dismissal of army charges), *cert. denied*, 440 U.S. 961, 99 S.Ct. 1504, 59 L.Ed.2d 774 (1979); *United States v. MacDonald*, 485 F. Supp. 1087 (E.D.N.C. 1979) (denying post-conviction bail pending appeal); *United States v. MacDonald*, 632 F.2d 258 (4th Cir. 1980) (reversing conviction on speedy trial grounds), *reh'g en banc denied*, 635 F.2d 1115 (4th Cir. 1980) (over published dissents of five judges), *rev'd*, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982) (finding no speedy trial violation); *United States v. MacDonald*, 688 F.2d 224 (4th Cir. 1982) (rejecting due process and evidentiary challenges to conviction), *cert. denied*, 459 U.S. 1103, 103 S.Ct. 726, 74 L.Ed.2d 951 (1983); *United States v. MacDonald*, 607 F. Supp. 1183 (E.D.N.C 1985) (denying government's motion for forfeiture of proceeds from book and television program concerning the case); *United States v. MacDonald*, 640 F. Supp. 286 (E.D.N.C. 1985) (denying motions for a new trial and for a writ of habeas corpus), *aff'd*, 779 F.2d 962 (4th Cir. 1985) (affirming denial of motions for recusal, new trial, and habeas relief), *cert. denied*, 479 U.S. 813, 107 S.Ct. 63, 93 L.Ed.2d

22 (1986). Nevertheless, some background review is necessary for a complete understanding of the pending claims.

In the early morning of February 17, 1970, MacDonald's pregnant wife, Colette, and his two daughters, two-year-old Kristen and five-year-old Kimberly, were clubbed and stabbed to death in their apartment at Fort Bragg, North Carolina where MacDonald was stationed as an Army Medical Corps captain. Military police arrived at the scene and found MacDonald lying unconscious across Colette's body in the master bedroom. The bodies of Kristen and Kimberly were found in their bedrooms. MacDonald suffered multiple stab wounds, most superficial, but one which partially collapsed a lung, and was treated and released after a brief hospitalization.

MacDonald maintained in initial and subsequent interviews that the murders had been committed by a group of drug-crazed intruders. He stated that after falling asleep on the couch in the living room, he had been awakened by the screams of Colette and Kimberly and had seen a woman with blond hair wearing a floppy hat, boots and a short skirt carrying a flickering light and chanting "acid is groovy; kill the pigs." He said that three men standing near the couch attacked him, pulling and tearing off his pajama top which he then used to ward off their blows, and that the attackers continued to club and stab him until he lost consciousness. According to MacDonald, he awoke on the hall steps to the living room, found his wife's body in the master bedroom, covered her with his pajama top, and then found the children's bodies in their bedrooms. He called the military police for assistance, but had lost consciousness by the time they arrived.

Investigators initially accepted MacDonald's account of the murders and immediately began searching for four people fitting his descriptions of the alleged intruders. Considerable suspicion was focused upon Helena Stoeckley, a nineteen-year-old

Fayetteville resident who resembled MacDonald's description of the female assailant. Stoeckley had been seen returning to her apartment at 4:30 on the morning following the killings in the company of men also generally fitting the descriptions given by MacDonald. Within days of the crime, Stoeckley, an acknowledged heavy drug user, began telling people that she was involved in the murders or that she had been in the MacDonald apartment with friends who had committed the murders. She admitted to owning and frequently wearing a blond wig and a pair of white boots and said that she destroyed them within a few days after the crime because they might connect her with the MacDonald murders. At other times, however, Stoeckley denied any knowledge of the murders, saying that she had taken so many drugs on the night in question that she could not remember anything.

As the military police, the Army's Criminal Investigation Division (CID), the Federal Bureau of Investigation (FBI) and the Fayetteville police department examined the crime scene, they began to discover physical evidence which cast doubt on MacDonald's story and caused them to view him as a suspect. For example, threads from MacDonald's blue pajama top, supposedly torn during a struggle in the living room, were found in large numbers in the master bedroom and in the children's bedrooms, but not in the living room. A piece of a plastic surgeon's glove, with which the word "pig" appeared to have been written in Colette's blood on the headboard in the master bedroom, was found to match gloves found under a sink in the MacDonald apartment. Moreover, investigators felt that the relative lack of damage to the apartment and the absence of direct physical evidence they could link to intruders was inconsistent with MacDonald's version of events. From this and similar evidence, they became convinced that MacDonald had

killed his family and staged the crime scene to cover up the murders.

The Army formally charged MacDonald with the three murders on May 1, 1970, but charges were dropped on October 23, 1970 on the recommendation of the investigating officer following hearings held pursuant to Article 32 of the Uniform Code of Military Justice, and MacDonald was granted a discharge from the Army. The investigation into the murders continued over the next several years, however, and MacDonald was eventually indicted by a federal grand jury on January 24, 1975. A series of pre-trial motions and interlocutory appeals delayed commencement of the trial until July 1979.

At the trial, which lasted seven weeks, the government called twenty-eight expert and lay witnesses and introduced approximately 1,100 pieces of evidence to support its theory that MacDonald, under the stress of long work hours, marital problems, and an argument with his wife over his younger daughter's bed wetting, flew into a rage and killed his wife and older daughter. According to the prosecution, MacDonald then attempted to avoid prosecution and punishment by killing his youngest daughter and staging the crime scene, using an Esquire magazine containing an article about the celebrated murders committed by Charles Manson and his cult and stained with a mixture of Colette and Kimberly's blood, so that it would appear that a similar drug crazed cult had murdered his family.

The heart of the government's case was a painstaking reconstruction of the events surrounding the murders based on government scientists' analysis of blood, fibers, and other physical evidence found at the crime scene. Specifically, the government introduced evidence tending to show that contrary to MacDonald's story, his blue pajama top had not been torn and punctured during a struggle in the living room and later placed by MacDonald on his wife's body to prevent shock, but instead

had been torn during a struggle with his wife and punctured while lying stationary on her body. While no fibers from the blue pajama top were found in the living room, 79 such fibers were found in the master bedroom, 19 in Kimberly's bedroom, two in Kristen's bedroom, and two on the blood-stained wooden club which was found outside the house near a utility room door. When the blue pajama top was folded in the same manner as it was found on Colette's body, it was shown that the pattern of puncture holes through the garment was strikingly similar to the pattern of icepick wounds suffered by Colette. Moreover, the pocket to the blue pajama top was found in the master bedroom, and it was shown at trial that the pocket had been stained with Colette's type blood prior to being torn from the garment. Because each member of the MacDonald family had a different blood type, the government was also able to present evidence showing that MacDonald's version of the events was contradicted by the actual location of blood stains, spatterings and footprints. The foregoing is only a brief summary of the evidence against MacDonald which is reviewed in more depth in the court's 1985 order denying motions for a new trial and for habeas relief. *See United States v. MacDonald*, 640 F. Supp. at 310-15.

MacDonald's defense consisted primarily of his own testimony, character witnesses, and impeachment of the integrity of the crime scene and evidence offered by the government. MacDonald also argued at trial that the presence of hair, fibers, fingerprints, and candle wax found by government investigators at the crime scene but not matched to any source in the MacDonald household supported MacDonald's testimony that there were intruders in the apartment.

During the trial, Helena Stoeckley was found by the government in South Carolina and was brought to Raleigh under a court subpoena to testify on behalf of MacDonald. After a

day-long recess during which time Stoeckley was interviewed by MacDonald's counsel, she testified before the jury at length regarding her knowledge of the MacDonald murders. The substance of her testimony was that she had never seen MacDonald before trial and had never been in his home. However, she vaguely felt that she might have had some connection with the crimes, since extensive drug use had left her with no memory of her whereabouts between midnight and 5:30 a.m. on the date of the murders. She testified that she had owned a shoulder length blond wig, but to the best of her recollection, was not wearing it when she went out on the night of the murders. She admitted to behavior suggesting that she had gone into mourning following the murders and to burning the wig two days later.

Because Stoeckley's trial testimony was at best inconclusive, MacDonald sought to introduce the testimony of seven witnesses who had heard Stoeckley state at various times that she was involved in the crimes or at least present in the MacDonald apartment on the night of the murders. After listening to the proposed testimony of these individuals without the presence of the jury, the court excluded the evidence on the grounds that it would be inadmissible hearsay and unduly confusing and prejudicial. While the testimony of these out-of-court statements by Stoeckley could arguably have been admissible as statements against Stoeckley's penal interest, the court found that there were no corroborating circumstances clearly indicating the trustworthiness of the statements. *See* Fed. R. Evid. 804(b)(3).

Following his conviction on two counts of second-degree murder and one count of first-degree murder, MacDonald filed an appeal on due process and evidentiary grounds, all of which were ultimately rejected. *United States v. MacDonald*, 688 F.2d 224 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103, 103 S.Ct. 726, 74 L.Ed.2d 951 (1983). In the fall of 1982, MacDonald

retained attorney Brian O'Neill to pursue collateral post-conviction remedies. O'Neill and his staff conducted an extensive investigation of the case, which included a review of materials received in response to Freedom of Information Act (FOIA) requests filed with the Department of Justice, the FBI, and the Army. On April 5, 1984, MacDonald filed motions seeking to have his convictions set aside or a new trial, one styled as a motion for a new trial under F.R.Crim.P. 33 and two for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. The motions were based on: (1) the alleged use of a psychiatrist as a government agent to obtain information from MacDonald in violation of his Fifth and Sixth Amendment rights, *see e.g., Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); (2) the suppression of exculpatory evidence allegedly in possession of the government, including a half-filled bloody syringe, bloody clothes and boots, skin found under Colette's fingernail, and the notes and photographs of a CID photographer suggesting that the letter "G" written on Stoeckley's apartment wall resembled the letter "G" in the word "pig" which was written in blood on the headboard in the master bedroom of the MacDonald apartment, *see, e.g., Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); and (3) post-trial statements by Stoeckley and two of her friends, Greg Mitchell and Cathy Perry Williams, in which they confessed to having participated in the murder of MacDonald's family. After an evidentiary hearing and legal arguments by counsel, the court denied all three motions, finding in part that the statements of Stoeckley and her friends would not be admissible at a new trial since circumstances strongly suggested that the confessions were fabricated. The court also found that the evidence that MacDonald claims was suppressed and the new evidence that he

would present at a second trial would not have affected the jury's verdict. *United States v. MacDonald*, 640 F. Supp. 286 (E.D.N.C), *aff'd*, 779 F.2d 962 (4th Cir. 1985), *cert. denied*, 479 U.S. 813, 107 S.Ct. 63, 93 L.Ed.2d 22 (1986).

MacDonald continued his quest to overturn his convictions with the aid of private investigators who reviewed documents from FOIA releases and conducted further interviews. One of these investigators, Ellen Dannelly, who had been working for MacDonald since 1983, compiled a report for MacDonald in October 1989 containing her findings that FBI laboratory technicians had discovered the presence of one black wool fiber and one white wool fiber in the debris taken from the right biceps area of Colette's pajama top, two black wool fibers and one green wool fiber in the debris removed from the wooden club murder weapon, and two black wool fibers in the debris removed from the mouth area of Colette, none of which were matched to any known source in the MacDonald home. See Affidavit of Dannelly at 3. These unmatched fibers were referred to in the government scientists' handwritten lab notes included in FOIA releases, but the fibers were not mentioned in the typewritten FBI lab reports given to MacDonald prior to trial.

In December 1989, attorney Anthony P. Bisceglie, who had been retained by MacDonald to obtain additional FOIA information and who remains as one of MacDonald's attorneys of record for the present motion. received FOIA releases from the FBI consisting of handwritten lab notes compiled by FBI technicians. In order to obtain additional information pertaining to the MacDonald case, Bisceglie went to the Army records office in Baltimore, Maryland to review the entire Army CID MacDonald file. He was accompanied by John Murphy, a paralegal for MacDonald's current habeas counsel Harvey A.

Silverglate, and by Fred Bost, an author researching a book on MacDonald's case.

Murphy states that in the course of reviewing copies of handwritten lab notes that he saw for the first time in May 1990, he found evidence indicating the government technicians' awareness of: (1) unmatched blond synthetic hairs, as long as 22 inches, on a hairbrush taken from the MacDonald home, (2) the presence of unmatched black, green, and white woolen fibers found in debris taken from critical places on Colette's body and the wooden club, (3) the presence of unmatched brown/green cotton fibers underneath Colette's body, and (4) the presence of unmatched human hairs in the bedding of the victims. *See* Affidavit of Murphy at 2. Murphy also states that he reviewed several documents received in post-trial FOIA releases indicating that the government was concerned about the lab technicians' findings of unmatched hairs and fibers and the prospect of the defense gaining access to the handwritten lab notes which documented these findings. These documents included: (1) a 1973 memorandum from the United States Attorney for the Eastern District of North Carolina, Thomas P. MacNamara, stating that unidentified hairs found in Colette's hand would "aid the defense"; (2) a pretrial legal research memo written to prosecutor Brian M. Murtagh by a law student assistant, Jeffrey S. Puretz, outlining the government's obligation to turn over the lab notes; and (3) a letter from Murtagh to the FBI written two years after trial requesting that all of MacDonald's FOIA requests be denied pending final resolution of the litigation. *Id.* at 39-40.

On October 19, 1990, MacDonald filed the instant petition on the basis of the evidence found by Murphy and listed in the preceding paragraph. MacDonald claims that the lab notes alone require that MacDonald be granted a new trial since they provide direct evidence that MacDonald was not lying when he

told of four drug-crazed hippies murdering his family. MacDonald further asserts that the three additional documents consisting of prosecution memos and letters, although not essential to his request for a new trial, demonstrate that prosecutor Murtagh purposefully withheld the handwritten lab notes prior to trial because he had concluded that they were highly exculpatory and would have been material in producing a verdict of acquittal.

## II. DISCUSSION

### *A. Materiality of Allegedly Suppressed Evidence*

MacDonald seeks relief under several different legal theories. First, he argues that the prosecution's failure to turn over exculpatory lab notes prior to trial violated the doctrine of *Brady v. Maryland*, which forbids "suppression by the prosecution of evidence favorable to an accused . . . irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-97. Second, MacDonald argues that the government violated due process by manipulating the trial testimony of expert witnesses to knowingly mislead the jury and conceal the existence of hair and fiber evidence corroborating MacDonald's story. *See Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1934). In a footnote, MacDonald also argues that the government's failure to turn over lab notes written by government agents who testified at trial regarding the subject of the notes may have violated his right to obtain statements and reports of witnesses under the Jencks Act, 18 U.S.C. § 3500. In response, the government attacks the merits of MacDonald's claims and also argues that MacDonald's petition should be legally barred under the doctrine of abuse of the writ. *See McCleskey v. Zant*, ___U.S.___, 111 S.Ct. 1454, 113 L.Ed.2d. 517 (1991).

Regardless of the legal theory invoked in support of habeas relief or the theory invoked to prevent the court from reaching the merits of MacDonald's claims, the ultimate question that the court must address — and the question of most interest to those who have followed the progress of this case for the past twenty years — is whether the jury's verdict would have been different had the defense been aware of the allegedly suppressed evidence at the time of trial. The purpose of criminal law and the constitutional protection afforded to those accused of crimes is to ensure the orderly and fair administration of justice. The law should not erect technical roadblocks for defendants seeking to receive the due process they are entitled to under the Constitution. At the same time, each of the legal doctrines designed to ensure due process is applied together with some derivation of the concept of materiality, keeping in mind that courts strive ultimately for just results rather than for technical perfection. *See, e.g., Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967) ("[T]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.").

Thus, under *Brady* and its progeny, only suppression of evidence that is material to the outcome of a trial violates the due process clause of the Fourteenth Amendment. *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196. Evidence is material when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985). A reasonable probability has in turn been defined as "a probability sufficient to undermine confidence in the outcome." *Id.* Under *Alcorta*, where a conviction is obtained by the prosecutor's false

presentation of evidence, a new trial must be ordered "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976). A failure to turn over statements of witnesses required under the Jencks Act will only warrant a new trial where the prosecutor's error was not harmless. *Goldberg v. United States*, 425 U.S. 94, 111 n.21, 96 S.Ct. 1338 n.21, 47 L.Ed.2d 603 (1976); *Rosenberg v. United States*, 360 U.S. 367, 371, 79 S.Ct. 1231, 1234, 3 L.Ed.2d 1304 (1959). Finally, under *McCleskey*, second and subsequent habeas petitions will only be permitted where the petitioner, in addition to showing cause for failure to raise the claims earlier, can show actual prejudice from the errors of which he complains or circumstances implicating a fundamental miscarriage of justice. *McCleskey*, 111 S.Ct. at 1470. The fundamental miscarriage of justice exception applies only to "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime" or to cases where "petitioner supplements a constitutional claim with a 'colorable showing of factual innocence.'" *Id.* at 1470-71.

With these various standards of materiality in mind, the court turns first to the effect that the allegedly suppressed evidence would have had on the trial and the jury's verdict. MacDonald states that he now has sufficient evidence to gain his acquittal and that only "the most blatant result-oriented intellectual dishonesty" could cause the court to conclude that the government's case would have survived a fair trial. Petitioner's Reply Brief at 88. After careful review of the handwritten lab notes at the core of the instant petition, the court finds that MacDonald has somewhat overstated the importance of the newly offered evidence.

The basis of MacDonald's claim is his argument that the allegedly suppressed lab notes reveal the existence of forensic

evidence of intruders that was critically lacking at trial. MacDonald asserts that the fibers discussed in the lab notes provide evidence which could have corroborated his testimony that drug-crazed hippies, and not MacDonald, were responsible for the crimes. In the absence of such forensic evidence supporting MacDonald's account of intruders murdering his family, the jury had no alternative but to conclude that MacDonald was lying and that he himself had committed the murders. During closing arguments, the government argued that there was no physical evidence of any intruders in the MacDonald home on the night of the murders and suggested that MacDonald was lying. The court in fact instructed the jurors that if they found that MacDonald had offered an exculpatory statement which proved to be false, they were permitted to consider whether the discrepancy pointed to a consciousness of guilt.

However, close analysis of the actual fiber evidence at issue reveals that the fibers provide little, if any, support for MacDonald's account of the crimes. In order to formulate its response in this action, the government submitted the fibers and hair at issue to an FBI forensic examiner, Michael P. Malone, for reexamination. according to Malone, the blond synthetic fibers found in Colette's clear-handled hairbrush and discussed in the lab notes were not consistent with blond wig hairs from any known wig fibers currently in the FBI laboratory reference collection. Of the four synthetic fibers from the brush which have been analyzed, one matches a grey wig reportedly owned by Colette and three are composed primarily of "saran", a substance which is not suitable for human wigs, but is used to make mannequin and doll hair, dust mops, and patio screens. MacDonald has presented no evidence that blond saran fibers have ever been used in the manufacture of human wigs. While MacDonald argues that Stoeckley's blond wig, which was

described by one witness as "stringy", may have been a mannequin wig, such speculation is unsupported by any evidence in the record.

The second class of allegedly newly discovered fiber evidence consists of one black wool fiber and one white wool fiber in the debris taken from the right biceps area of Colette's pajama top, two black wool fibers and one green wool fiber in the debris removed from the wooden club murder weapon, and two black wool fibers in the debris removed from the mouth area of Colette, none of which were matched to any known source in the MacDonald home. Despite what MacDonald describes as their "strategic" location, the significance of these fibers is diminished by the fact that they were found in relatively small numbers and that no two of these fibers appear to be from the same source. While MacDonald argues that these fibers' "only possible source is an intruder who had contact with both Colette and the wooden club murder weapon," Petitioner's Brief at 35, the government argues that the fibers could have fallen in the house at any time prior to the murders and then attached to Colette as a result of her contact with various rugs on the night of the murders. The government points out in support of this theory that blood evidence introduced at trial showed that Colette's body was in contact with three different rugs after being attacked. In fact, the white wool fiber found on the right biceps area of Colette's pajama top appears to be a fiber from the white shag rug in the master bedroom. Affidavit of Malone at 10.

Further, the government asserts that these fibers are unmatched to any known sources in the MacDonald household in part due to the fact that the MacDonald family's possessions are no longer available for forensic comparisons. Since most of the family's clothing was returned to MacDonald and disposed of after the Army charges against him were dropped, the actual

origin of these fibers will never be conclusively determined. However, even allowing for this uncertainty, the court finds that there is no likelihood that the jury would have reached a different verdict had it known about the existence of these few wool fibers.

MacDonald also mentions two other classes of allegedly newly discovered fiber evidence consisting of unmatched brown/green cotton fibers found underneath Colette's body and unmatched human hairs found in the bedding of the victims. As with the wool fiber evidence, the court finds no reason to believe that the result at trial would have been altered had this fiber and hair evidence been brought to the attention of the jury.

Perhaps because the actual fibers would do little to provide evidence that drug-crazed intruders were in the MacDonald home on the night of the murders, MacDonald attempts to argue that the lab notes discussing the presence of the fibers — and not the fibers themselves — constitute the important new evidence that would result in acquittal if presented to the jury. However, even if the lab notes could have been introduced at trial, in the court's opinion the jury's verdict would not have been affected, since the government would have been able to show the relative insignificance of the underlying fibers as discussed above.

Given that the synthetic blond fibers appear not to be wig hair and that the other fibers at issue are unmatched to each other and to known sources, the allegedly suppressed evidence would simply mirror other evidence of unexplained household debris that was presented to the jury. At trial, MacDonald introduced evidence of unidentified fibers, hairs, fingerprints, and candle wax found at the crime scene by government investigators. MacDonald was permitted to argue to the jury that the large amount of unmatched evidence in the apartment supported a conclusion that intruders had committed the murders. Nevertheless, the jury apparently rejected

MacDonald's argument that the unexplained household debris undermined the showing made by the government's presentation of physical evidence pointing toward MacDonald's guilt. Where, as here, the allegedly suppressed fibers "would have provided merely cumulative evidence" of unmatched household debris, a new trial is not warranted. *United States v. Page*, 828 F.2d 1476, 1479 (10th Cir.), *cert. denied*, 484 U.S. 989, 108 S.Ct. 510, 98 L.Ed.2d 508 (1987).

In addition to the claim that the allegedly newly discovered fiber evidence would have corroborated his account of the murders, MacDonald argues that this evidence would have caused the court to admit the testimony of the seven witnesses who had heard Stoeckley admit to some involvement with the crimes. MacDonald points out that the court barred this hearsay testimony in part due to the fact that "no physical evidence was uncovered at the crime scene which would support Stoeckley's confessions." *United States v. MacDonald*, 640 F. Supp at 323. MacDonald asserts that the court would have admitted the proposed testimony had it known that the government's own experts had discovered blond synthetic fibers in the hairbrush, unmatched hair in the victims' beds, and other unmatched fibers in strategic locations. MacDonald states that the Fourth Circuit, in reviewing the conviction on direct appeal, noted that had MacDonald been able to present to the jury the witnesses who had heard Stoeckley confess to involvement in the crimes, it would have destroyed the government's case. *See* Petitioner's Brief at 25.

However, the court's exclusion of the Stoeckley hearsay witnesses was based only in part on the absence of corroborating physical evidence. The primary reason for the exclusion of these witnesses was Stoeckley's utter unreliability as evidenced by her demeanor on the stand and her history of drug abuse. As the court explained, most of Stoeckley's statements appeared to be

made while she was under the influence of powerful narcotics and "were so clearly untrustworthy that the court should not hesitate to exercise its discretion to exclude the evidence under Rule 403, F.R.E." *United States v. MacDonald*, 485 F. Supp. at 1093. The court's decision on the admissibility of the Stoeckley hearsay witnesses would not have been different had the court been aware of the allegedly suppressed fiber evidence at issue here.

Even had these hearsay witnesses been allowed to testify before the jury, the likely effect of such testimony would not have been as great as MacDonald contends. Contrary to MacDonald's assertion, the Fourth Circuit has never stated that these hearsay witnesses would have destroyed the government's case. The Fourth Circuit stated only that: "Had *Stoeckley* testified as it was reasonable to expect she might have testified, the injury to the government's case would have been incalculably great." *United States v. MacDonald*, 632 F.2d at 264 (emphasis added). In fact, the holding most relevant to determining the effect that testimony of Stoeckley's hearsay statements would have had on the jury is this court's decision regarding the materiality of post-trial statements by Stoeckley, wherein the court stated that: "[I]f the jury had not heard [Stoeckley's] testimony but instead had heard her so-called confessions, in the court's opinion the jury would not have reached a different verdict, for the government's cross-examination would surely have developed the glaring inconsistencies in her story as previously noted and that because of her drug-crazed condition she was a totally unreliable, untrustworthy witness." *United States v. MacDonald*, 640 F. Supp. at 333. In affirming that decision, the Fourth Circuit held that "the district judge could appropriately find that the . . . statements . . . did not meet the materiality requirement for a new trial." *United States v. MacDonald*, 779 F.2d at 965.

Moreover, even Judge Murnaghan, who stated that he would have admitted the Stoeckley hearsay witnesses at trial had he been the trial judge, recognized that "[i]f such evidence was not persuasive . . . the jury, with very great probability, would not have been misled by it." *United States v. MacDonald*, 688 F.2d at 234 (Murnaghan, J. concurring).

In sum, the court finds that under any of the relevant legal standards of materiality, the fiber evidence at issue here is insufficient to warrant habeas relief. As the court noted in its order denying a previous motion for new trial, at a second trial:

> the government would again be able to introduce such damaging evidence against MacDonald as his pajama top, the location of fibers from the pajama top in parts of the house which would be inconsistent with MacDonald's story, the bloody footprint leaving Kimberly MacDonald's bedroom, the pajama top demonstration whereby it was shown that the holes in the top matched icepick wounds on the body of Colette MacDonald, and the other evidence which proved, apparently conclusively so, that MacDonald murdered his family.

*United States v. MacDonald*, 640 F. Supp. at 332. Having reviewed the history of the proceedings and the newly offered evidence in detail, the court finds that MacDonald has not shown either a "reasonable probability", *see Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383, or "any reasonable likelihood," *see Agurs*, 427 U.S. at 103, 96 S.Ct. at 2397, of a different result had MacDonald been given access to the lab notes at trial. To the extent that the failure to turn over the lab notes could be construed as a violation of the Jencks Act, the court finds that any error by the prosecutor was harmless. *See Goldberg v. United States*, 425 U.S. at 111 n.21, 96 S.Ct. at 1348 n.21.

Finally, MacDonald has not demonstrated that the alleged suppression of evidence resulted in either actual prejudice or a fundamental miscarriage of justice necessary to excuse his failure to raise the instant claims as part of his initial habeas proceeding. *See McCleskey*, 111 S.Ct. at 1470.

*B. Government's Suppression of Exculpatory Evidence*

While the court primarily rests its denial of habeas relief on a finding that the allegedly suppressed evidence would not have caused the jury to reach a different verdict at trial, the decision could alternatively be based on the court's finding that the prosecution adequately complied with its duty to turn over exculpatory evidence. In order to establish a *Brady* violation, a petitioner must show that: "(1) the prosecution suppressed the evidence; (2) the evidence would have been favorable to the accused; and (3) the suppressed evidence is material." *United States v. Wolf*, 839 F.2d 1387, 1391 (10th Cir.), *cert. denied*, 488 U.S. 923, 109 S.Ct. 304, 102 L.Ed.2d 323 (1988).

Regarding the first element of a claim under *Brady*, MacDonald has not shown that the government suppressed any evidence to which he was entitled. While MacDonald was not given access to the handwritten lab notes describing the fiber evidence, the government complied with its duty under *Brady* by allowing MacDonald to examine and test any of the actual physical evidence, including the fibers at issue here. *See, e.g., United States v. Wolf*, 839 F.2d at 1391 ("If the means of obtaining the exculpatory evidence has been provided to the defense, however, a *Brady* claim fails, even if the prosecution does not physically deliver the evidence requested."); *United States v. Page*, 828 F.2d at 1479 ("[A] new trial is not warranted by evidence which, with reasonable diligence, could have been discovered and produced at trial."); *United States v. Gaggi*, 811 F.2d 47, 59 (2d Cir.), *cert. denied*, 482 U.S. 929,

107 S.Ct. 3214, 96 L.Ed.2d 701 (1987) ("no *Brady* violation occurs if the defendant . . . should have known the essential facts permitting him to take advantage of any exculpatory evidence"); *United States v. Ramirez*, 810 F.2d 1338, 1343 (5th Cir.), *cert. denied*, 484 U.S. 844, 108 S.Ct. 136, 98 L.Ed.2d 93 (1987) ("a *Brady* violation does not arise if, with reasonable diligence, [defendant] could have obtained the information"); *United States v. Griggs*, 713 F.2d 672, 674 (11th Cir. 1983) ("Where defendants . . . had within their knowledge the information by which they could have ascertained the alleged *Brady* material, there is no suppression by the government.").

Here, it is undisputed that MacDonald was given unfettered access to the physical evidence. Pursuant to a June 19, 1979 order of this court, all of the government's physical evidence was made available to Dr. John Thornton, a forensic expert retained by MacDonald. Thornton made no effort to examine the hair and fiber evidence currently at issue, choosing instead to concentrate on MacDonald's pajama top, the sheets from the master bedroom, floor boards containing a bloody footprint, and cuttings from the surgical rubber glove fragments. Affidavit of Murtagh at 25. MacDonald now argues that Thornton would have had no reason to look at the fiber evidence since its significance was hidden by the suppression of the lab notes and the fact that the box containing the blond synthetic fibers from the clear-handled hairbrush was labeled "black, black & grey [illegible] synthetic hairs." However, the fact remains that Thornton, for whatever reason, chose not to examine any of the fiber evidence, despite being given an opportunity to do so.

Further, suppression of evidence under *Brady* can only occur with "information which had been known to the prosecution but unknown to the defense." *Agurs*, 427 U.S. at 103, 96 S.Ct. at 2397. Here, MacDonald has presented no evidence that the prosecuting attorneys had read the lab notes

currently at issue and there is no reason to suspect that they were aware of any potential exculpatory material in the notes. Prosecutor Brian M. Murtagh, in fact, states affirmatively that he never read the lab notes pertaining to fiber analysis prior to trial and would have had no reason to have done so. *See* Affidavit of Murtagh at 7, 14. In a case such as this one, where the allegedly suppressed evidence was discussed only in a few isolated notations buried in hundreds of pages of handwritten lab notes, *Brady* does not require the prosecution "to peruse through all of its evidence with an eye to the defendant's theory of the case and then to specify to the defendant the evidence which supports that theory." *United States v. Davis*, 673 F. Supp. 252, 256 (N.D.Ill. 1987) (emphasis omitted).

Regarding the second element of a claim under *Brady*, while the court is willing to accept MacDonald's assertion that the handwritten lab notes were exculpatory, there is some doubt as to whether the allegedly suppressed evidence would have actually aided the defense had the notes been available at trial. Without any evidence that saran is used in the production of human wig hair, the presence of blond saran fibers in a hairbrush in the MacDonald home would have done little to corroborate MacDonald's account of an intruder with blond hair or a blond wig. Moreover, Stoeckley testified at trial that she was not wearing her wig on the night of the murders, although she apparently told Jane Zillioux, a neighbor in Nashville, Tennessee, that she was worried about her wig getting wet from the rain. Similarly, the other allegedly suppressed fiber evidence would have been of rather limited exculpatory value given that the unmatched fibers were not found in sufficient quantity — particularly in comparison to the large numbers of fibers from MacDonald's pajama top — to suggest a life and death struggle with four intruders.

*C. Government's Presentation of False or Misleading Evidence*

In addition to his claim under Brady, MacDonald asserts a claim under *Alcorta v. Texas* and *Mooney v. Holohan*. Those cases hold generally that due process is denied when the government presents to the jury testimony which is false and the government knows of its falsity. *Alcorta*, 355 U.S. at 31, 78 S.Ct. at 105; *Mooney*, 294 U.S. at 112, 55 S.Ct. at 341. As with MacDonald's *Brady* claim, the court primarily bases its decision to deny relief under *Alcorta* on the grounds that any alleged violation of MacDonald's due process rights was not material to the result at trial. However, the court addresses the elements of MacDonald's claim beyond materiality to make it clear that MacDonald has not met his burden of establishing even a technical violation of his rights under *Alcorta* and *Mooney*.

Critical to the analysis of constitutional violations under the Alcorta doctrine is the question of whether the prosecution knew of the falsity of the testimony it had elicited and permitted it to go uncorrected. Petitioner "must show that the prosecutor or other government officers knew the testimony in question was false in order to prevail." *Thompson v. Garrison*, 516 F.2d 986, 988 (4th Cir.), *cert. denied*, 423 U.S. 933, 96 S.Ct. 287, 466 L.Ed.2d 263 (1975). See also *Beasley v. Holland*, 649 F. Supp. 561, 566 (S.D.W.V. 1986) (Petitioner must show "that the false testimony was knowingly and intentionally employed by the government in order to obtain a conviction."). The focus of an inquiry into an *Alcorta* claim is therefore on the state of mind of the prosecution team. However, "speculative and conjectural possibilities" or "bald allegations . . . are not sufficient to impute knowledge to the government." *United States v. Cole*, 755 F.2d 748, 763 (11th Cir. 1985).

MacDonald claims that the alleged misleading testimony was elicited from witnesses Dillard Browning, Paul Stombaugh,

and Janice Glisson, all of whom were government forensic experts who had conducted tests on portions of the physical evidence. MacDonald asserts that the jury was misled by the testimony of Browning and Stombaugh, who stated that two fibers from MacDonald's pajama top had been found on the wooden club murder weapon but did not reveal the presence of a dark woolen fiber on the club, as reported in the handwritten lab notes. MacDonald also argues that the government manipulated the presentation of evidence so that Glisson would only testify about her blood examinations so as to avoid any mention by her of the blond fibers found in the hairbrush.

In arguing that his due process rights were violated by prosecutorial misconduct, MacDonald engages in a vicious, but largely unsupported, attack on the conduct, ethics and integrity of prosecutor Murtagh. MacDonald states that Murtagh "ignored the guidelines of his employer, the United States Department of Justice," Petitioner's Brief at 75, n.59, engaged in "intentional suppression," Petitioner's Reply Brief at 75, n.28, and "orchestrated one of the cruelest charades in American legal history." *Id.* at 89.

Despite MacDonald's protestations that he has set forth a specific claim and has identified the sources of all of his information, *id.* at 52 n.39, the court finds that MacDonald's invective against Murtagh is based on mere speculation regarding the motivations for his actions. While MacDonald attacks Murtagh's failure to turn over exculpatory material as a "reprehensible" deception of the court, *id.* at 64 n.52, no evidence is offered to show that Murtagh was aware of the contents of the handwritten lab notes at issue. Further, there is no evidence that Glisson's testimony was limited to discussion of her blood analysis for any reason other than the fact that she was the government's primary serology expert in the case. Regarding the failure of Browning and Stombaugh to mention

the presence of an unmatched fiber on the club, a review of the record shows that they testified about the presence of items of debris from the club that matched the pajama top but never specifically stated that these were the only fibers found in that location. Trial Transcript at 3784 (Browning), 4097-98 (Stombaugh). Moreover, the jury was told by Browning that "there were many single fibers or loose fibers" found in the MacDonald home and not matched to any known source, thus negating the suggestion that the jury would have been led to believe that no other fibers were found on the club. *Id.* at 3880.

In short, what MacDonald ascribes to Murtagh's bad faith manipulation of testimony at trial appears to the court to be the result of factors unrelated to prosecutorial misconduct. The court has had the opportunity to observe the conduct of counsel for the government and for MacDonald over the last sixteen years and has found all counsel, without exception, to have performed in a diligent and professional manner. While there have been sharp conflicts over a multiplicity of procedural and substantive issues, the court has not perceived any instance where attorneys for either side crossed the boundary between zealous advocacy and impropriety. Any suggestion that the government engaged in conduct intended to deny MacDonald his right to a fair trial is unsupported by the extensive record in this action.

*D. Government's Failure to Turn Over Statements of Witnesses*

In a footnote, MacDonald argues that the government's failure to turn over lab notes written by government agents who testified at trial regarding the subject of the notes may have violated his right to obtain statements and reports of witnesses under the Jencks Act, 18 U.S.C. § 3500. See also *Jencks v. United States*, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957). MacDonald has not pressed this argument either in briefs or during the motion hearing, but for the sake of

completeness, the court will address the merits of the claim. Again, the primary basis for denying this claim is that any alleged Jencks Act violation would not have materially affected the result at trial. Additionally, MacDonald has failed to show that the government wrongfully withheld any prior statements of witnesses relating to the fiber evidence at issue.

Under the Jencks Act, the government is only required to produce to the defendant a statement of a witness "which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b). A Jencks Act request must be made at trial following the testimony of a witness, and the government is under no obligation to turn over prior statements absent a request from the defendant. *United States v. Lemus*, 542 F.2d 222, 223 (4th Cir. 1976), *cert. denied*, 430 U.S. 947, 97 S.Ct. 1584, 51 L.Ed.2d 794 (1977).

In the present case, MacDonald has not shown that any of the lab notes discussing the allegedly suppressed fiber evidence were the focus of Jencks Act requests. The lab notes of Janice Glisson, which discussed the blond synthetic fibers, could not be construed as Jencks material since she gave no testimony relating to her fiber examinations. The lab notes of James C. Frier, which noted the presence of black wool and other fibers, were not subject to disclosure under the Jencks Act because Frier never testified at trial. MacDonald also complains that he did not receive the lab notes of Dillard Browning which referred to findings of unmatched hair and fiber, but no request was made for Browning's lab notes after his direct testimony or at any time during his cross examination. Affidavit of Murtagh at 9-10.

*E. Abuse of the Writ*

As the court has made clear above, MacDonald's petition fails to establish a violation of his constitutional rights entitling

him to habeas relief. An additional independent ground for denying MacDonald's petition is provided by the doctrine of abuse of the writ, which defines the circumstances in which federal courts may decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus. Under this doctrine, the court need not reach the merits of MacDonald's claims at this time, since the information upon which the instant petition is based was in MacDonald's possession in 1984 when a previous petition for a writ of habeas corpus was filed.

In *McCleskey v. Zant*, a case released during the pendency of these proceedings, the Supreme Court held that second or subsequent habeas actions will only be allowed upon a showing of "cause and prejudice" or a showing "that a fundamental miscarriage of justice would result from a failure to entertain the claim." *McCleskey*, 111 S.Ct at 1470. The cause standard, borrowed from procedural default cases, "requires the petitioner to show that 'some objective factor external to the defense impeded counsel's efforts' to raise the claim" previously. *Id.* The Supreme Court did not specifically address the issue of prejudice, but held generally that a petitioner must show actual prejudice from the errors of which he complains. *Id.* The "miscarriage of justice" exception applies only to "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime." *Id.*

Procedurally, since the government has properly pleaded abuse of the writ, MacDonald bears the burden of disproving abuse. *Id.* MacDonald first attempts to fulfill that burden by arguing that the instant petition is not a second habeas petition, because the 1984 motions, some of which were purportedly based on 28 U.S.C. § 2255, should have been considered simply as a motion for new trial based on the ground of newly discovered evidence filed within the two-year time limit of

F.R.Crim.P. 33. However, it cannot be seriously contended that the 1984 motions were not at least in part brought under the habeas corpus statute. In particular, MacDonald's claim based on the alleged use of a psychiatrist as a government agent to obtain information from MacDonald in violation of his Fifth and Sixth Amendment rights was not supported by any newly discovered evidence and therefore could only have been brought under 28 U.S.C. § 2255.

Next, MacDonald contests the retroactive application of *McCleskey* to create a procedural barrier to his action, which was filed almost six months before the *McCleskey* decision was released. However, in the McCleskey case itself, the rule announced was applied retroactively to bar a second habeas petition filed by the petitioner in 1987. Moreover, decisions refining legal principles governing habeas petitions are routinely applied retroactively to pending habeas petitions. *See, e.g., Felix v. Virgin Islands Government*, 702 F.2d 54, 57 (3d Cir. 1983); *O'Berry v. Wainwright*, 546 F.2d 1204, 1218 n.23 (5th Cir.), *cert. denied*, 433 U.S. 911, 97 S.Ct. 2981, 53 L.Ed.2d 1096 (1977). The Supreme Court stated that its decision in *McCleskey* was consistent with other modern abuse of the writ decisions. *McCleskey*, 111 S.Ct at 1471. Thus *McCleskey* is a refinement of existing law rather than a statement of new law, and its holding can be applied to MacDonald's pending habeas petition.

MacDonald also attempts to distinguish *McCleskey* on the grounds that it involved a habeas proceeding following a state criminal conviction, while the instant petition arises out of a federal criminal proceeding. Although the concerns of federal deference toward state proceedings present in Section 2254 petitions are absent in Section 2255 petitions, the underlying rationale of McCleskey was based on ensuring finality in habeas litigation regardless of the origin of the criminal conviction. *Id.* at 1468.

Regarding his failure to raise the instant claims at the time of the initial habeas proceedings, MacDonald argues that he did not deliberately withhold claims based on the lab notes from his 1984 petition. However, MacDonald's intent is irrelevant, since "[a]buse of the writ is not confined to instances of deliberate abandonment. *Id.* at 1467. The real issue here is not whether the allegedly newly discovered evidence was deliberately withheld from the 1984 petition, but rather whether the failure to raise these issues in 1984 was due to inexcusable neglect on the part of MacDonald's first habeas counsel. A lengthy quote from *McCleskey* is instructive here:

> That McCleskey did not possess or could not reasonably have obtained certain evidence fails to establish cause if other known or discoverable evidence could have supported the claim in any event. "Cause . . . requires a showing of some external impediment *preventing* counsel from constructing or raising a claim." For cause to exist, the external impediment, whether it be government interference or the reasonable unavailability of the factual basis for the claim, must have prevented petitioner from raising the claim. Abuse of the writ doctrine examines *petitioner's* conduct: the question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process. The requirement of cause in the abuse of the writ context is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition. If what petitioner knows or could discover upon reasonable investigation supports a claim for relief in a federal habeas petition, what he does not know is irrelevant.

> Omission of the claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim.

*Id.* at 1472 (cites omitted; emphasis in original).

MacDonald contends that the reason that the instant claim was not raised in 1984 is that "[t]he government never disclosed until 1990 the documents upon which this claim is based." Petitioner's Reply Brief at 80. However, a close inspection of the affidavits and documents submitted by both sides belies MacDonald's assertion that the crucial documents were not available in 1984. The affidavit of Karen R. Davidson, an associate of MacDonald's previous habeas counsel Brian O'Neill, states that lab notes of James Frier documenting the existence of black, green and white wool fibers taken from the body of Colette and from the club are date-stamped as having been received by O'Neill's office from the FBI on July 20, 1983. Affidavit of Davidson at 6. Davidson, though, has no memory of having seen these notes or recognizing their importance.

Regarding the synthetic blond fiber from the clearhandled hairbrush, Davidson admits to having seen a page from Janice Glisson's lab notes which mentions the presence of synthetic blond fibers but contains a question mark after the word "synthetic". This page not only bears a date-stamp showing that it was received in O'Neill's office on June 30, 1983, but also has attached to it a post-it note from a law student clerk, John Crouchley, showing that the potential significance of this document was explored by members of the MacDonald legal team at the time. *See* Affidavit of Davidson, Exhibit 2. Davidson states that the presence of the blond synthetic fiber in the hairbrush was not included in the 1984 motion because of the legal team's inability to find any confirmation of the ambiguous reference to blond synthetic hair. Davidson further

states that had she been aware of a so-called confirmatory note in which Glisson again referenced findings of blond synthetic hairs, she would have brought them to O'Neill's attention for inclusion in the 1984 motion. This second reference to blond synthetic hairs was apparently not discovered by any member of his legal or investigative team until 1990.

Thus according to evidence submitted by MacDonald, all of the lab notes at issue except Glisson's confirmatory note regarding blond synthetic hair were date-stamped as having been received in O'Neill's office in 1983. Clearly the 1983 and 1984 FOIA releases contained much, if not all, of the information upon which the instant claims are based. The court notes that private investigator Ellen Dannelly had by October 1989 compiled a report for MacDonald discussing the unmatched fibers found on the club and on Colette's mouth and biceps area. Since the lawyer retained by MacDonald to obtain FOIA releases did not begin to receive additional documents until December 1989, Dannelly's conclusions must have been based on information available to MacDonald by 1984.

Moreover, there is evidence submitted by the government that the confirmatory note, which MacDonald claims would have led to the inclusion of a claim based on suppressed fiber evidence in the April 1984 motions, was actually part of a FOIA release sent by the government to O'Neill in August 1984, while the first habeas petition was awaiting oral argument. Although not date-stamped as received by O'Neill's office, the page of Glisson's lab notes containing the confirmatory note bears a handwritten number 785 in the lower right hand corner. Janice W. Barkley, who was involved in processing FOIA requests in the MacDonald case as a civilian employee of the army, states that she numbered that document prior to January 26, 1984 as part of a sequence of documents to be released to O'Neill. Affidavit of Barkley at 11. G.M. Andersen, who replaced

Barkley upon her resignation, states that this document was included in a FOIA release sent to O'Neill in August 1984. Affidavit of Andersen at 12.

Taken as a whole, the evidence regarding dates of FOIA releases of lab notes undermines MacDonald's contention that he did not have information sufficient to advance the claims made in this petition until 1990. At the very least, by early 1984 O'Neill had possession of — if not knowledge of — lab notes making reference to all of the fibers claimed by MacDonald to show the presence of intruders. Prior to the filing of the 1984 motion, the only document of arguable significance unavailable to O'Neill was the confirmatory lab note regarding synthetic blond fibers, and this document appears to have been sent to O'Neill in August 1984.

MacDonald earnestly contends that the confirmatory note was never received by O'Neill, despite the appearance of FOIA release numbers indicating that it was sent in August 1984. Even accepting MacDonald's avowal that this confirmatory note was never sent or was somehow lost en route, the court finds that MacDonald was put on notice of a potential claim based on the blond synthetic fibers in 1984 and should not be permitted to raise such a claim more than six years later. It is undisputed that MacDonald's counsel in 1984 had actual knowledge of the initial Glisson note making reference to synthetic blond fibers found in the clear handled hairbrush. Glisson's reference to blond synthetic fibers could have been confirmed by examining the actual fibers at issue, since the physical evidence taken from the scene remained available to MacDonald at all times. MacDonald's further suggestion that, in the absence of the confirmatory note, a claim based on the blond synthetic hairs would have subjected him to sanctions under Rule 11 of the Federal Rules of Civil Procedure is without merit.

In addition to the lab notes, MacDonald ascribes significance to three memoranda found by Murphy in the FOIA releases, including: (1) a 1973 memorandum from the United States Attorney for the Eastern District of North Carolina, Thomas P. MacNamara, stating that unidentified hairs found in Colette's hand would "aid the defense"; (2) a pretrial legal research memo written to prosecutor Brian M. Murtagh by a law student assistant, Jeffrey S. Puretz, outlining the government's obligation to turn over the lab notes; and (3) a letter from Murtagh to the FBI written two years after trial requesting that all of MacDonald's FOIA requests be denied pending final resolution of the litigation. These memoranda relate primarily to MacDonald's *Alcorta* claim of knowingly orchestrated false or misleading presentation of evidence.

As with the lab notes, it appears that some or all of these memoranda were available to MacDonald prior to the filing of the 1984 motion. With respect to the U.S. Attorney's prosecution memo, the copy submitted by MacDonald bears a date stamp apparently indicating that it was received in O'Neill's office on February 17, 1983 from the Department of Justice. *See* Affidavit of Murphy, Exhibit 32. With respect to the Puretz Memorandum, it is apparent from the FOIA number at the bottom right hand corner that this document was released to O'Neill at least by November 1983. *See* Affidavit of Murphy, Exhibit 33; Affidavit of Murtagh at 31; Affidavit of Ross at 2-5. With respect to the Murtagh letter about FOIA requests, the copy submitted by MacDonald bears a date stamp apparently indicating that it was received in O'Neill's office on August 1, 1983 from the Department of Justice. *See* Affidavit of Murphy, Exhibit 35. Thus to the extent that these memoranda could have given rise to a habeas claim, MacDonald is barred from introducing such a claim for the first time in 1990, since the

documents were in MacDonald's possession when he filed his initial habeas petition.

As a final attempt to establish cause for not including the instant claims in the 1984 motion, MacDonald argues that O'Neill's failure to recognize the significance of documents received in his office amounted to ineffective assistance of counsel and therefore constituted cause excusing abuse of the writ. However, this argument is precluded by the Supreme Court's recent holding that where there is no constitutional right to counsel, as in habeas proceedings, a showing of attorney error is insufficient to meet the cause standard in procedural default cases. *Coleman v. Thompson*, ___U.S.___, 111 S.Ct. 2546, 2564-67, 115 L.Ed.2d 640 (1991).

Thus MacDonald has failed to show cause for his failure to include the current claims in his first petition for a writ of habeas corpus filed in April 1984. At that time, MacDonald either possessed or could have discovered through reasonable investigation the information upon which the instant petition is based. Further, as discussed above, MacDonald has not shown actual prejudice resulting from the errors of which he complains. Even in the absence of a showing of cause and prejudice excusing abuse of the writ, courts are required to address the merits of a second or subsequent habeas petition where a petitioner "supplements a constitutional claim with a 'colorable showing of factual innocence.'" *McCleskey*, 111 S.Ct. at 1471. However, as explained more fully above, MacDonald has not demonstrated that his case fits within this "narrow class of cases" implicating a fundamental miscarriage of justice or that "a constitutional violation probably has caused the conviction of one innocent of the crime." *Id.* 111 S.Ct. at 1470.

## III. CONCLUSION

In the 1985 order which denied motions for a new trial and for a writ of habeas corpus, the court noted that the evidence presented at trial was the result of an extensive analysis of the crime scene over a period of nine years and that five years of additional investigation had failed to uncover evidence which would undermine confidence in the jury's verdict. Now, more than six years later, the court is again asked to review the jury's findings in light of evidence only recently discovered by MacDonald's apparently indefatigable team of investigators and lawyers.

Although relief could be denied solely on the basis of a procedural barrier due to MacDonald's failure to raise the instant claims as part of his initial habeas proceedings, the court has reviewed in detail the newly discovered evidence and has considered the merits of MacDonald's claims. Having done so, the court finds that the fiber evidence presented here for the first time would have been insufficient to alter the result at trial. In the end, the additional evidence has not changed the court's opinion that "if the government were again called upon to present its evidence at a new trial and MacDonald was able to put all, or even selected parts of his new evidence before a second jury, the jury would again reach the almost inescapable conclusion that he was responsible for these horrible crimes." *United States v. MacDonald*, 640 F Supp. at 334.

Based on the foregoing, MacDonald's petition for a writ of habeas corpus must be denied. An order accordingly will be entered.

**APPENDIX C**

FILED: July 9, 1992

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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91-6613

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UNITED STATES OF AMERICA,

Appellee,

versus

JEFFREY R. MacDONALD,

Appellant.

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ORDER

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The defendant has petitioned for a rehearing of our decision herein, filed of June 2, 1992, and has supplied a proposed supporting supplementary statement in a letter of counsel for the defendant dated June 16, 1992, in support of that petition. After consideration of the petition for rehearing, as well as of the letter of defendant's counsel dated June 16, 1992, the panel is of the opinion that the petition for rehearing should be and is denied. No member of this court or the panel requested a poll on the suggestion for rehearing en banc.

IT IS ORDERED that the petition for rehearing as supplemented and suggestion for rehearing en banc are denied.

/s/ Donald S. Russell
Circuit Judge
For the Panel